Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

ISIDRO GOMEZ and LINDA L. GOMEZ, Wife,

Petitioners,

v.

W. J. ATKINS, in his official and individual capacity,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Has the Fourth Circuit decided an important question of federal constitutional law that has not been, but should be, settled by this Court?

II. Is the Fourth Circuit's opinion in conflict with decisions of other United States Courts of Appeal holding that a law enforcement officer is not entitled to qualified immunity where the officer either intentionally or with reckless disregard for the truth includes material false and misleading information in, or omits clearly critical information from, an application for an arrest warrant to a magistrate?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit were:

Isidro Gomez and wife, Linda L. Gomez, Plaintiffs-Appellees (Petitioners herein)

and

W.J. Atkins, in his official and individual capacity, Defendant-Appellant (Respondent herein)

The remaining Defendants in the District Court, Earl Butler, Sheriff of Cumberland County, in his official capacity, and Western Surety Company, were not parties to the appeal in the Fourth Circuit. The Fourth Circuit denied the Defendant Earl Butler's petition for permission to appeal the denial of his motion for summary judgment. Nevertheless, the decision of the Fourth Circuit resulted in the dismissal of the Petitioners' claims against these Defendants.

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STATEMENT OF BASIS FOR JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") were filed on July 11, 2002. On July 24, 2002, the Petitioners timely filed a Petition for Rehearing *En Banc.* On August 5, 2002, the Fourth Circuit denied the Petitioners' Petition for Rehearing. (Appendix C, pp. 52a-53a) This Court has jurisdiction to review the judgment of the Fourth Circuit on a writ of certiorari pursuant to the provisions of 28 U.S.C. § 1254 (1993).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves application of 42 U.S.C. § 1983 (1984) and the Fourth Amendment to the United States Constitution:

42 U.S.C. § 1983 (1984) provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1984).

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE AND FACTS

(a) ***Statement of the Case.***

The Petitioners Isidro and Linda L. Gomez instituted this action on September 10, 1999, based upon the wrongful arrest and prosecution of the Petitioner Isidro Gomez (herein "Isidro"), amounting to a violation of his Fourth Amendment right to be arrested only upon probable cause. The Respondent W.J. Atkins was the investigating officer and the one who obtained the arrest warrant. Jurisdiction in the District Court was premised on 28 U.S.C. § 1331 (1993), as a proceeding to enforce rights and remedies secured by the United States Constitution, through the mechanism provided in 42 U.S.C. § 1983 (1994).

On November 17, 2000, the Respondent filed a motion for summary judgment, principally based on the doctrine of qualified immunity. In response, the Petitioners contended that the Respondent lost the shield of qualified immunity when he included material false and misleading information in, and omitted clearly critical exculpatory information from, his application to the magistrate for a warrant to arrest Isidro for first degree murder.

On August 28, 2001, the Honorable W. Earl Britt, Senior United States District Judge for the Eastern District of North Carolina, denied the Respondent's motion for summary judgment, concluding as follows:

> [T]he court concludes that when Atkins' statement of the evidence is corrected for misleading, false and omitted evidence, all that remains is a practically unrefuted alibi, no physical connection of Isidro to

> the crime with the exception of broad class evidence, circumstances that strongly suggest that Rickie Jean was murdered long before Isidro left Atlanta, and evidence that undeniably suggests that someone other than Isidro was the murderer (i.e., size "7" footprints). In sum, having thoroughly reviewed the totality of evidence available to Atkins at the time he sought the arrest warrant, the court concludes that the evidence does not support a finding of probable cause. The court further concludes that a reasonable officer could not have believed that there was probable cause to seek an arrest warrant under the circumstances.

(App. B, pp. 45a-46a)

On August 31, 2001, the Respondent gave notice of appeal to the Fourth Circuit. On July 11, 2002, the Fourth Circuit issued its opinion, reversing the District Court and granting qualified immunity to the Respondent. In the opinion, discussion of the false and misleading information submitted by the Respondent to the magistrate in his application for an arrest warrant — the primary factual and legal basis of the Petitioners' response to the Respondent's claim of qualified immunity — was reduced to a footnote. (*See* App. A, p. 8a n.2) In a separate concurring opinion, Judge Hamilton expressed his disdain for the Respondent's conduct of including "material" false and misleading information in his warrant application, "which dealt directly with the heart of the State's case, i.e., whether Isidro murdered his first wife," stating that such conduct is "a disturbing commentary on the manner in which law enforcement activities are conducted in Cumberland County, North Carolina." (*See* App. A, p. 24a)

(b) ***Statement of the Facts.***

Isidro and Rickie Jean Murray (herein "Rickie Jean") were married in September of 1968. (JA 1488) By June of 1980, she and Isidro had been living separate and apart in Fayetteville, North Carolina, for about a year and a half. (JA 1489) Isidro had custody of their children. In July of 1980, Isidro and Rickie

Jean met for a weekend in Atlanta to attempt to reconcile. (JA 1489) Isidro drove from Texas, where he had dropped off their sons to stay at his parents' house for the summer, and Rickie Jean, who worked for Piedmont Airlines and could fly for free, caught a flight to Atlanta. (JA 1318-19) They had an enjoyable weekend and were even intimate. (JA 1320)

On Sunday, July 13, 1980, they left to return to Fayetteville driving Isidro's car. About seven or eight miles down Interstate 20, the crankshaft pulley sheared off and the car broke down. (JA 1490) This was later determined to be a manufacturing problem. (JA 1491, JA 1503-07) The parts Isidro needed to fix his car could not be purchased until a Chevrolet dealership opened up on Monday morning. (JA 1491) Some friends of the family, the Hortons, invited Isidro and Rickie Jean to spend the night. Rickie Jean had to be at work at Piedmont at 6:30 a.m. on Monday morning and did not want to miss her scheduled shift. (JA 1491) At that time, she was only a part-time employee of Piedmont, but she loved the job and wanted badly to become a full-time employee. (JA 1322) She had never missed a day of work or even been late for a shift. (JA 644) Consequently, Rickie Jean decided to fly back to Fayetteville that night on an evening Piedmont flight. (JA 1491) After dinner, Isidro and the Hortons dropped Rickie Jean off at the airport. (JA 1492)

Isidro spent Sunday night with the Hortons. In the morning, Isidro purchased the parts he needed to fix his car. After making the necessary repairs, Isidro left for Fayetteville sometime between 10:00 and 10:30 a.m., Monday, July 14, 1980. Mrs. Horton and Sandra Gail Mills, the fiancée of the Hortons' son, were at the house when Isidro left. It is roughly 376 miles from the Hortons' home to the Gomez residence in Fayetteville. Driving at about the speed limit (55 m.p.h. on the interstate at that time), and stopping once to get gas, have a snack, and stretch his legs, Isidro arrived home at around six o'clock in the evening. (JA 1492, 1508)

After noticing what appeared to be blood stains at the house, learning from a call from Rickie Jean's supervisor that she did not show up for work that morning, and being unsuccessful in

his efforts to locate her, Isidro called the Cumberland County Sheriff's Department. (JA 1495) The first deputy arrived around 7:00 p.m., and other investigators arrived shortly thereafter. (JA 1495-96) After the house was searched and the evidence collected, Isidro voluntarily went down to the law enforcement center to be interviewed by the investigating officers. Isidro was wearing white gym shorts and a white tank-top shirt. He had no cuts, bruises or abrasions on his hands, face, arms, legs, or any other exposed part of his body. (JA 1496)

At approximately 10:45 a.m. the next morning, Rickie Jean's dead body was discovered in the back floorboard of her car in a wooded area about a mile or so from the Gomez house. She was still in her nightgown. (JA 1496) The ID technicians were able to lift latent fingerprints and palm prints from Rickie Jean's car. (JA 450, 454) The fingerprints did not belong to Rickie Jean or Isidro. (JA 458-59)

An autopsy revealed that Rickie Jean had been beaten badly about the face and body and stabbed to death. The fatal blow was a stab wound to the chest that punctured her heart and lungs. She also had defensive wounds and blood under her fingernails. (JA 470-75) Because she was still in her nightgown, and never made it to work, it was apparent that she had been murdered or abducted before her scheduled work time on Monday morning. (JA 963-64)

The investigators continued to investigate Rickie Jean's murder. (JA 1498) They tested the physical evidence and talked to a number of witnesses. Some of Rickie Jean's friends claimed that she told them that Isidro had physically abused her at times and had even threatened to kill her. Others said Rickie Jean never told them any such thing. Nobody, however, ever saw Isidro hit or threaten his wife. (JA 1433-34) Tests of the evidence collected at the Gomez house revealed the presence of type "O" and type "A" blood. Rickie Jean's blood type was "O," and Isidro's blood type was "A," which is a common blood type. (JA 455-57)

Fibers collected from Rickie Jean's body and the bedding found in her car were tested and found to be "microscopically

consistent" with Isidro's hair. (JA 462-63) A microscopic analysis of a hair follicle in 1980, however, could only reveal whether the hair was human hair, if it was a head hair or body hair, whether the person was Caucasian or Negroid, and perhaps the approximate age of the person (*e.g.*, if the hair was gray, the person probably was older). Such an analysis could not identify the actual person to whom the hair belonged. (JA 1535)

Isidro cooperated with the investigation at all times. On June 1, 1981, as Isidro was preparing to move from the area because of a job transfer, two of the investigating officers came by his house. They told Isidro that his presence in Atlanta had been confirmed and that they knew he did not kill Rickie Jean. (JA 1498, 1517-18) This was the last time Isidro would hear from the Cumberland County Sheriff's Department for nearly fifteen years.

The Respondent Atkins (herein "Atkins") first began reviewing the Gomez file in late October or early November, 1995. (JA 1079) On November 8, 1995, Atkins traveled to Chesterfield, Virginia, to interview Isidro regarding Rickie Jean's murder. During the interview, Atkins asked Isidro what his shoe size was, and Isidro told him that he wore a size "11" or "11 ½" depending on the type of shoe. Atkins memorialized this in the notes he took during the interview. (JA 1499, 1519-24)

In April of 1996, at the request of Atkins, Isidro provided new hair and blood samples for DNA testing. (JA 1500) Atkins sent Isidro's blood sample to LabCorp, a private laboratory, on April 16, 1996, along with some reference samples of Rickie Jean's DNA and fingernail clippings collected by the medical examiner. (JA 1147-49, 1275-76) A serology test on these clippings in 1980 had revealed the presence of type "A" blood under the nails. (JA 455-457) LabCorp only tested half of the clippings. (JA 1261) LabCorp determined that the DNA profile obtained from the tested nail clippings was "consistent with the DNA profile" of Rickie Jean and "different than the DNA profile" of Isidro Gomez. LabCorp sent these results to Atkins on April 29, 1996. (JA 1275-76)

By May 14, 1996, Atkins had not uncovered any additional evidence that pointed to the guilt of Isidro Gomez. (*See* JA 250-762; Supp. JA 1623-28) Furthermore, he had not asked LabCorp to test the rest of the fingernail clippings (JA 1267-68), nor had he made any effort to seek any laboratory comparison between the hair samples provided by Isidro and the fibers collected at the crime scene in 1980. (JA 1123-24)

On May 14, 1996, Atkins applied for a warrant to arrest Isidro for Rickie Jean's murder. (JA 1130) In support of his warrant application, Atkins presented the magistrate with an Affidavit and a copy of his "Statement of Investigating Officer in Detail" (herein "Statement"). (JA 1164-65) The Affidavit set forth no substantive facts whatsoever relating to Isidro's alleged guilt (*See* JA 1532-38), and the Statement prepared by Atkins and read by the magistrate supplied the factual basis for the issuance of the arrest warrant. (JA 1534-1535) The Statement, which purports to contain facts pointing to Isidro's guilt, is rife with false and misleading statements (JA 1534), and omitted material exculpatory information (JA 1538), bearing directly upon Atkins' theory that Isidro stabbed Rickie Jean to death. (JA 1534)

The very first sentence of Atkins' Statement is totally false. In Paragraph 1 of the Statement, Atkins states that, "[a]t the time of the autopsy of the Victim, *the Defendant's* body hairs were found on the body of the Victim." (JA 427) (emphasis added) The 1980 SBI report only concluded that the hairs found and the sample provided by Isidro were "microscopically consistent." (JA 462-63) As stated earlier, the only thing such a test could tell about an individual was whether he was Caucasian or Negroid, and perhaps the rough age of the individual. (JA 1535) Atkins either intentionally lied, or recklessly assumed that "microscopically consistent" meant the hair belonged to Isidro. Atkins never made any attempt to find out what it meant. (JA 1104) Any reasonable homicide investigator in 1996 should have known that the 1980 test could not provide an identification of the person to whom the hair belonged. (JA 1535) Regardless of whether it was intentional or merely reckless, this is an

egregious mistake that never should have occurred, as it placed Isidro directly at the second crime scene, the car in which Rickie Jean's body was discovered. (JA 1534)[1]

In Paragraph 4 of the Statement, in yet another effort to place Isidro at the scene of the crime by tying him to the bloody shoe prints left at the house by the murderer, Atkins states that "[t]he Defendant's shoe size *by his own statement* is '7' to '7 ½' depending upon what type of shoe." (JA 427) (emphasis added) This is directly contrary to Atkins' own notes of his November, 1995, interview with Isidro, in which Atkins recorded that Isidro said his shoe size was "11" to "11 ½." (JA 1499, 1519-24) Atkins took clearly exculpatory information (Isidro's actual shoe size) and, either on purpose or through gross recklessness, transformed it into incriminating evidence placing Isidro at the first crime scene, the Gomez residence. (JA 427)

Isidro's alibi was irrefutable; it had been in 1980 and it was in 1996. (JA 1126) In an effort to refute the irrefutable, Atkins told the magistrate that "while the Defendant has stated several times that he arrived in Fayetteville, N.C. at [6:00 p.m.], there are *witnesses* who have stated they spoke personally with Isidore (sic) Gomez by telephone as early as [3:00 p.m.] this same day and at least 3 hours prior to him stating he arrived at [6:00 p.m.]." (JA 430) (emphasis added) While the false information set forth in Paragraphs 1 and 4 could potentially be the product of either intent or gross recklessness, this statement is an outright fabrication. Atkins has admitted that these alleged "witnesses" were, in fact, only a single witness — David T. Rogers, Rickie Jean's supervisor at Piedmont. (JA 1190) Moreover, the Statement by Atkins is a gross misrepresentation of the statements given to investigators in 1980 and 1996. (*See* JA 250-762; Supp. JA 1623-28)

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1. In Paragraph 2, Atkins informed the magistrate that SBI testing revealed that the blood found under Rickie Jean's fingernails was type "A," the same type as Isidro. (JA 427) As with a microscopic hair analysis, blood typing yields only class evidence, with a class numbering in the millions. (JA 1535) Atkins did not inform the magistrate, however, that DNA testing of the nail clippings did not match Isidro's DNA.

In 1980, Mr. Rogers told the detectives that his first call to Isidro was at 6:20 p.m. (JA 645), which is consistent with Isidro's recollection. (JA 1494) In 1996, sixteen years later, Mr. Rogers told Atkins that he "believed" that it was around 3:00 p.m. when he called and spoke with Isidro. (JA 640) This was inconsistent with what Mr. Rogers had originally stated in 1980, only two days after he spoke with Isidro on the phone. (JA 645) In his 1996 statement, Mr. Rogers expressly told Atkins that "his recall of the events in July, 1980 and what he said in his interviews then with the original Detectives might be different, but what he had told the Detectives in July, 1980 would be the facts and the truth as he knew it then and that [t]he notes written by the Detectives in 1980 would be the facts as he told it to them." (JA 641) Instead of providing the magistrate with the version told to investigators in 1980, only days after the event, and which confirmed Isidro's version, Atkins used only the self-serving 1996 statement.[2] (*See* JA 427-32)

These three examples of the false and misleading information Atkins supplied to the magistrate, if true, would affirmatively refute Isidro's alibi, thus giving him the opportunity to commit the crime (if Rickie Jean was not murdered prior to her scheduled work time — *see infra*), and placing Isidro at *both* crime scenes. These false and misleading statements, taken in a light most favorable to the Petitioners, were material to a finding of probable cause. Without them, and other material false statements and omissions, the magistrate was left with nothing more than ambiguous and neutral facts, with no context, (JA 1534, 1607) and no direct evidence placing Isidro (and not

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2. Based on this particular misrepresentation, it is hard to understand the Fourth Circuit's conclusion that the Petitioners "failed to forecast any evidence establishing that the [Statement] was intentionally falsified by Sergeant Atkins." (App. A, p. 22a) In any event, the proper standard is whether the officer intentionally *or with reckless disregard for the truth* submitted false and misleading information to the magistrate in a warrant application. (*See infra*)

a class of millions of which Isidro was but a member) in North Carolina in time to kill Rickie Jean or be at either crime scene.[3]

In a final attempt to refute Isidro's alibi, Atkins recounted SBI Agent Jerry Webster's account of his trip from Atlanta to Fayetteville, purportedly recreating Isidro's drive on July 14, 1980. (JA 430) Webster stated that the trip took approximately "four and a half to five hours" without speeding. (*Id.*) It is precisely 376.4 miles from the Hortons' home in Ellenwood, Georgia, to Isidro's house in Fayetteville. Most of the trip, but not all of it, consisted of driving on Interstates 20 and 95. In 1980, the speed limit for interstate travel was 55 miles per hour. (JA 1492, 1508) To drive this distance in five hours, one would have to average 75 miles per hour, even taking into account traffic lights, stop signs, and any rush hour traffic. To drive it in four and a half hours, one would have to average approximately 84 miles an hour. These average speeds are inconsistent with Webster's claim, adopted by Atkins, that he did not speed. (JA 1492-93) Webster subsequently admitted that this driving time estimate was wrong. (JA 1465-68) Atkins never tried to determine how far it was from the Hortons' house to Isidro's house, or how long it would take to make the drive. (JA 1210-1211)

Atkins also failed to include in his Statement several facts that were clearly relevant and material to the theory he presented to the magistrate. He failed to inform the magistrate that the Hortons, Isidro's chief alibi witnesses, had both passed polygraph tests in 1980. (JA 427-32, 954) Atkins never spoke

3. Atkins' Statement contained numerous other false and misleading assertions. For example, Atkins stated that blood was found on a wet washcloth on the edge of the bathtub, and that the blood was diluted from having been washed out. (JA 430) This was meant to create the inference that Isidro, who admitted to recently showering in that bathroom, had rinsed out the bloody washcloth in an effort to hide the crime. In fact, the 1980 serology report found no blood on the washcloth. (JA 457) Atkins also stated that a check with Chevrolet indicated that there was never a problem with the crankshaft pulley. (JA 430) This is also untrue. (JA 1491, 1503-07)

with the Hortons, citing "budget restraints." (JA 1115) Atkins did not inform the magistrate that the latent fingerprints and palm prints lifted from Rickie Jean's car did not match Isidro's prints. Atkins did not tell the magistrate that: Rickie Jean loved her job at Piedmont; had never been late for a single shift; failed to show up for work on Monday morning, July 14, 1980 (the sole reason she left Atlanta on Sunday evening); and that Rickie Jean was still wearing her nightgown when she was found (*See* JA 427-32, 954) – facts all strongly indicating that she was murdered sometime between the time she arrived back in Fayetteville late Sunday evening and her scheduled time for work at 6:30 a.m. the next morning (*See* JA 963-64), when Isidro was indisputably still in Atlanta. The investigators, including Atkins, could never determine where Rickie Jean was or who she was with during this time. (JA 1127)

On May 14, 1996, based upon Atkins' Statement, and all of the false and misleading information contained therein, the Magistrate issued a warrant for Isidro's arrest, charging that he "did of malice aforethought kill and murder" Rickie Jean Gomez. (JA 953) Isidro was arrested the same day.

After Isidro's arrest, the decision was finally made to test the rest of Rickie Jean's fingernail clippings. On October 4, 1996, Atkins delivered the remaining clippings to LabCorp for analysis. On October 30, 1996, LabCorp issued its conclusions: "The DNA profile obtained from the left nails (Item 2) is consistent with a mixture of DNA from Ricki (sic) Gomez (Item 3) *and another individual*. Isidro Gomez (Item 1) is *excluded* as a possible contributor to the genetic material in this sample." (emphasis added) The type "A" blood found under Ricki Jean's fingernails did not belong to Isidro Gomez. (JA 1277-78)

In August of 1997, the Sheriff's Department finally submitted the hair samples collected from Isidro Gomez in 1996, prior to his arrest, and the fibers collected from Rickie Jean's body in 1980, to the FBI Laboratory for analysis. The FBI Lab found that there was no microscopic association between the samples. (JA 1569-71) Because the samples were microscopically dissimilar, there was no need to do DNA testing.

Furthermore, one of the "hairs" found on Rickie Jean's body was actually an "off-white carpet-type fiber" — it was not even a hair. (JA 1569-71) The fibers found on Rickie Jean's body were not Isidro's hairs. (JA 1569-71)

Thereafter, the Assistant District Attorney prosecuting Isidro questioned whether the State had a "good faith basis to proceed" with the prosecution. (JA 1572), On January 13, 1998, the State dropped all charges against Isidro based upon a lack of evidence. A memorandum attached to the dismissal identifies the State's reasons for the dismissal. (JA 963-64)

This memorandum cites both the DNA analysis from LabCorp and the FBI hair analysis, both of which excluded Isidro. Although great pains are taken to point out that these reports did not exist at the time of Isidro's arrest, the memorandum does not state that the hair and blood samples, which formed the basis for the tests, were voluntarily provided by Isidro *prior* to his arrest. The memorandum also notes that there were no latent fingerprints belonging to Isidro; that the bloody shoe print tracks on the driveway were too small to match Isidro's shoe size; that it was apparent that Rickie Jean was killed sometime before her scheduled time for work on Monday, July 14, 1980; that Isidro's alibi for that time period "is not refutable;" and that Isidro's alibi witnesses successfully passed polygraph tests and had given consistent statements to the investigators. (JA 963-64) *All* of this exculpatory evidence was in Atkins' possession prior to Isidro's arrest, but was not provided to the magistrate in the warrant application. (*See* JA 250-762; Supp. JA 1623-28)

ARGUMENT

I. The Fourth Circuit Has Decided An Important Question Of Federal Constitutional Law That Has Not Been, But Should Be, Settled By This Court.

(a) *The consistent application of the judicially created qualified immunity doctrine to § 1983 cases alleging the deprivation of Constitutional rights is an important matter deserving of the Supreme Court's attention and guidance.*

This appeal involves the cherished Fourth Amendment right of the Petitioner Isidro Gomez to be arrested only upon probable cause. There are no cases more important to the functioning of a civilized society than those confronting individual liberties guaranteed by the U.S. Constitution: "There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman. . . ." *Ex parte Lange*, 85 U.S. 163, 21 L. Ed. 872, 18 Wall. 163 (1873).

The private cause of action created by 42 U.S.C. § 1983 was designed as a mechanism to redress violations of such constitutional liberties by those charged by law with enforcing these fundamental principles:

> The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (*quoting United States v. Classic*, 313 U.S. 299, 326 (1941)). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, supra, 365 U.S. at 172.

> How "uniquely amiss" it would be, therefore, if the government itself — "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct" — were permitted to disavow liability for the injury it has begotten. . . . A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guaranties, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. . . .

Owen v. City of Independence, 445 U.S. 622, 651 (1980).

The rights which the Petitioners seek to vindicate in this action are based upon conduct that Judge Hamilton, in his concurring opinion, characterized as "a disturbing commentary on the manner in which law enforcement activities are conducted in Cumberland County, North Carolina." (App. A, p. 24a) The Petitioners contend that the Respondent misused and abused his authority by providing false and misleading information to, and omitting critical exculpatory information from, his application to the magistrate for a warrant to arrest Isidro Gomez for murder, which information was material to the finding of probable cause. The Fourth Circuit, in reversing the decision of the District Court, ignored the Petitioners' contention and, based upon its own evaluation of the Respondent's "reasonableness," held that the Respondent was entitled to qualified immunity.

As set forth below, the Fourth Circuit's opinion conflicts with decisions of other United States Courts of Appeal. The Petitioners respectfully contend that this Court's precious judicial resources are necessary to resolve this conflict, so that disposition of claims based upon inviolable constitutional rights, which should apply equally and uniformly to all citizens, should not depend upon the Circuit in which the alleged constitutional violation occurs.

(b) ***This Court has never decided the civil equivalent of Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), and United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), and should use this case to bring harmony to the U.S. Courts of Appeal on this important constitutional issue.***

As a general rule, the issuance of a warrant by a neutral and detached magistrate creates the presumption that it was objectively reasonable for an officer to believe that there was probable cause. *See United States v. Ventresca*, 380 U.S. 102, 109, 85 S. Ct. 741, 746, 13 L. Ed. 2d 684 (1965). In *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), however, this Court carved out an important exception to the traditional rule. In *Franks*, this Court held that where a criminal defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in an application for a search warrant, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires a hearing on the validity of the search warrant. Furthermore, if the defendant establishes at the hearing an intentional falsification or reckless disregard for the truth, and the application *sans* the false information is insufficient to establish probable cause, the search warrant is void and the fruits of the search are excluded. *Id.* at 154-55.

This Court reaffirmed *Franks* in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), holding that suppression of evidence is appropriate "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth." *Id.* at 923. Under such circumstances, "the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.*

Since *Franks* and *Leon*, numerous United States Courts of Appeal have applied this test to § 1983 actions for malicious

prosecution, and particularly with respect to defendant officers' claims for qualified immunity. *See, e.g.*, *Butler v. Elle*, 281 F.3d 1014 (9th Cir. 2002); *Lippay v. Christos*, 996 F.2d 1490 (3d Cir. 1993); *Bruning v. Pixler*, 949 F.2d 352 (10th Cir. 1991); *Burke v. Beene*, 948 F.2d 489 (8th Cir. 1991); *Golino v. City of New Haven*, 950 F.2d 864 (2d Cir. 1991); *and DeLoach v. Bevers*, 922 F.2d 618 (10th Cir. 1990). This Court, however, has never decided the civil equivalent of *Franks* or *Leon*. The most analogous decision of this Court, also frequently cited in cases applying *Franks* and *Leon* in the § 1983 civil context, is *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). In *Malley*, this Court held that defendant officers are not entitled to qualified immunity "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue. . . ." *Id.* at 341.

The logical extension of *Franks*, *Leon* and *Malley*, in a civil § 1983 context, is that where a magistrate is misled by information in a warrant application that the officer knew was false or should have known was false but for his reckless disregard for the truth, then the officer has no reasonable grounds for believing that the warrant was properly issued, *Leon*, 468 U.S. at 923, and where an officer has no reasonable grounds for believing that a warrant should properly issue, the officer is not entitled to qualified immunity, *Malley*, 475 U.S. at 341. This is the rule of law applied by numerous other United States Courts of Appeal, as cited above and discussed more fully below, but ignored by the Fourth Circuit in this appeal. The Petitioners urge this High Court to take this opportunity to resolve this conflict between the Fourth Circuit and other U.S. Courts of Appeal, and establish a uniform test for determining qualified immunity where a law enforcement officer includes material false and misleading information in, and omits clearly critical exculpatory information from, an application to a magistrate for an arrest warrant.

II. The Fourth Circuit's Opinion Is In Conflict With Decisions Of Other United States Courts Of Appeal Holding That A Law Enforcement Officer Is Not Entitled To Qualified Immunity Where The Officer Either Intentionally Or With Reckless Disregard For The Truth Includes Material False And Misleading Information In, Or Omits Clearly Critical Information From, An Application For An Arrest Warrant To A Magistrate.

(a) *The Fourth Circuit's decision directly conflicts with decisions of other U.S. Courts of Appeal regarding the application of Franks v. Delaware and United States v. Leon to claims for qualified immunity in § 1983 civil actions.*

The qualified immunity defense is only available when the conduct of the official "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). As *Harlow* makes clear, the concept of "reasonableness" relates to the knowledge of clearly established rights, not the general nature of the official's conduct. This is entirely consistent with the principal that officials may only be held responsible for transgressing bright lines — the "bright line" is the clearly established law. Furthermore, "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent officer should know the law governing his conduct." *Harlow*, 457 U.S. at 818-19. If a plaintiff alleges and proffers evidence that a government official violated clearly established law, then summary judgment on the basis of qualified immunity must be denied.

In this case, the Fourth Circuit misapplied this test and instead focused on its own freestanding evaluation of the Respondent's "reasonableness" in seeking an arrest warrant (*See* App. A, pp. 13a-23a), and not on whether a reasonable officer in the Respondent's position would have known that submitting material false and misleading information to a

magistrate in support of a warrant application violated clearly established law. By so doing, the Fourth Circuit's opinion conflicts with numerous decisions of other United States Courts of Appeal on at least two critical issues.

First, other U.S. Courts of Appeal have held that where an officer includes material false and misleading information in, and omits clearly critical information from, an application for a warrant, the officer is not entitled to qualified immunity. *See, e.g., Butler v. Elle*, 281 F.3d 1014 (9th Cir. 2002); *Lippay v. Christos*, 996 F.2d 1490 (3d Cir. 1993); *Golino v. City of New Haven*, 950 F.2d 864 (2d Cir. 1991); *Bruning v. Pixler*, 949 F.2d 352 (10th Cir. 1991); and *Burke v. Beene*, 948 F.2d 489 (8th Cir. 1991).

Second, other U.S. Courts of Appeal have held that whether an officer intentionally or with a reckless disregard for the truth included false and misleading information to, or omitted clearly critical information from, a warrant application to a magistrate, and — more importantly for the purposes of this appeal — whether the warrant would have issued but for the false, misleading and excluded information, are questions of fact for the jury. *See, e.g., Golino, supra*; *DeLoach v. Bevers*, 922 F.2d 618 (10th Cir. 1990); *Hill v. McIntyre*, 884 F.2d 271 (6th Cir. 1989); and *Hindman v. City of Paris, Tex.*, 746 F.2d 1063 (5th Cir. 1984).

In reversing the District Court's denial of summary judgment on qualified immunity grounds, the Fourth Circuit gave no weight to the material false and misleading statements and omitted information in the Respondent's warrant application. Instead, the Fourth Circuit, after stating that it was not required to view the Respondent's conduct and decisions in the light most favorable to the Petitioners (*see* App. A, p. 12a), usurped the function of the jury by engaging in its own evaluation of the facts — giving the Respondent the benefit of the doubt on all decisions he made — and deciding as a matter of law that the Respondent was entitled to qualified immunity. As a result, the Fourth Circuit has created a conflict with virtually every

other U.S. Circuit Court of Appeal, and has likewise run afoul of analogous precedent established by this Court.

That the Respondent supplied false and misleading information in his application for an arrest warrant cannot be disputed. The Respondent falsely reported to the magistrate that Isidro's body hairs were found on the body of the victim. This false statement puts Isidro at the second crime scene (Rickie Jean's car, where her body was found). The Respondent falsely reported to the magistrate that Isidro's shoe size was consistent with the size of the bloody shoe prints left by the perpetrator at the house, when the Respondent's own notes indicated otherwise. This false statement puts Isidro at the first crime scene (the Gomez residence, where the crime apparently occurred). The Respondent falsely reported to the magistrate that "witnesses" personally spoke with Isidro by telephone in Fayetteville at a time that contradicted Isidro's otherwise iron-clad alibi (when, in fact, only one witness stated this in 1996, and the statement was inconsistent with what that witness told investigators in 1980, only two days after the crime. This false statement destroys the credibility of Isidro's alibi and arguably provides him with the opportunity to commit the crime. The Respondent falsely reported to the magistrate that blood was found on a wet washcloth on the edge of the bathtub where Isidro had just showered (when, in fact, the 1980 serology report found no blood on the washcloth). This false statement directly linked Isidro to efforts to conceal the crime.

This case is also significant for what the Respondent did not report to the magistrate — clearly exculpatory information that was material to the Respondent's theory of the crime. The Respondent did not report that: (1) DNA tests on Rickie Jean's bloody fingernails did not find a match with Isidro; (2) Isidro's chief alibi witnesses had both passed polygraph tests in 1981; (3) latent fingerprints and palm prints lifted from both crime scenes did not match Isidro; (4) despite foreign blood found under Rickie Jean's fingernails, and evidence of defensive wounds indicating a struggle, Isidro had no cuts, scratches or bruises on his body; (5) Rickie Jean left Atlanta on Sunday

evening so she could go to work at Piedmont on Monday morning; (6) she loved her job and had never been so much as late for a single shift; (7) she failed to report to work on Monday morning; and (8) she was still wearing her nightgown when her body was found; — facts that all strongly suggest (as the D.A. ultimately acknowledged in dismissing the criminal charges) that Rickie Jean was murdered sometime prior to her scheduled work time on Monday morning, before Isidro even left Atlanta. (*See Statement of Facts, supra*) (*See also*, App. B, p. 45a)

Both the Fourth Circuit's opinion, in the lone footnote discussing this issue, and the concurring opinion of Judge Hamilton, expressly characterize these factual inaccuracies as "material." (*See* App. A, pp. 8a n.2, 24a) While this Court has not defined "materiality" in this specific context, it has in the analogous situation of the government's obligation to disclose evidence favorable to the accused in criminal cases under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In that context, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S. Ct. 989, 1001, 94 L. Ed. 2d 40 (1987) (*quoting United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985) (opinion of Blackmun, J.); *and see id.*, 473 U.S. at 685, 105 S. Ct. at 3385 (opinion of White, J.)). Moreover, in the context of misrepresentations and concealments, this Court has held that *material* misrepresentations or concealments are ones that are "predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision." *Kungys v. United States*, 485 U.S. 759, 771, 108 S. Ct. 1537, 1547, 99 L. Ed. 2d 839 (1988).

Consequently, by characterizing the factual inaccuracies in the Respondent's warrant application as "material," the Fourth Circuit acknowledged that the false and misleading information had a natural tendency to affect the magistrate's decision, and that there was a reasonable probability that disclosure of the

misrepresentations would have changed the result. *Ritchie*, *supra*; *Kungys*, *supra*. In virtually any other U.S. Court of Appeals, such conduct would result in the loss of qualified immunity.

Second Circuit Court of Appeals

The Second Circuit has held that:

> Where an officer knows, or has reason to know, that he has materially misled a magistrate on the basis for a finding of probable cause, as where a material omission is intended to enhance the contents of the affidavit as support for a conclusion of probable cause, *see generally*, *Rivera v. United States*, 928 F.2d at 605; *United States v. Strini*, 658 F.2d 593, 597 (8th Cir. 1981), the shield of immunity is lost, *see Malley v. Briggs*, 475 U.S. at 344-45, 106 S. Ct. at 1097-98 (adopting standard set in *United States v. Leon*, 468 U.S. 897, 923, 104 S. Ct. 3405, 3420, 82 L. Ed. 2d 677 (1984), as proper standard for objective reasonableness for qualified immunity purposes). An officer can "have no reasonable grounds for believing that [a] warrant was properly issued" "[i]f the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth," *United States v. Leon*, 468 U.S. at 923, 104 S. Ct. at 3421.

Golino v. City of New Haven, 950 F.2d 864, 871 (2d Cir. 1991).

In *Golino*, as here, a murder suspect filed a § 1983 action against the defendants for malicious prosecution. The defendants moved for summary judgment based on qualified immunity, and the plaintiff responded by contending that the defendants lost the "shield of immunity" by submitting false and misleading information in, and omitting material exculpatory information from, the warrant application to the magistrate. The Second Circuit affirmed the denial of summary judgment, holding that the evidence in the light most favorable to the plaintiff

demonstrated that the defendants materially misled the magistrate, thereby precluding summary judgment on qualified immunity grounds. *Id.* at 872.

Third Circuit Court of Appeals

In *Lippay v. Christos*, 996 F.2d 1490 (3d Cir. 1993), citing *Malley*, *supra*, the Third Circuit Court of Appeals held that: "If a police officer submits an affidavit containing statements he knows to be false or would know are false if he had not recklessly disregarded the truth, the officer obviously failed to observe a right that was clearly established. Thus, he is not entitled to qualified immunity." *Id.* at 1504. In *Lippay*, the plaintiff filed a § 1983 malicious prosecution action against the defendant narcotics agent arising from his arrest on drug charges. After a jury verdict in favor of the plaintiff, the District Court denied the defendant's post-trial motions. Based upon its interpretation of *Malley*, the Third Circuit affirmed the District Court, concluding that because the jury found that the plaintiff proved all elements of his Fourth Amendment seizure claim, it could not at the same time have concluded that the defendant did not violate a "clearly established" constitutional right of which "a reasonable person would have known." *Id.*

Ninth Circuit Court of Appeals

In the Ninth Circuit, "[i]f an officer submitted an affidavit that contained statements he knew to be false or would have known to be false had he not recklessly disregarded the truth . . . , he cannot be said to have acted in a reasonable manner, and the shield of immunity is lost." *Hervey v. Estes*, 65 F.3d 784, 788-89 (9th Cir. 1995) (*quoting Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991)). Where a plaintiff makes a substantial showing of actionable deception that is material to a finding of probable cause, summary judgment on the basis of qualified immunity is improper. *Butler v. Elle*, 281 F.3d 1014 (9th Cir. 2002).

In *Butler*, the plaintiff claimed the defendant submitted false and misleading information in his affidavit to the magistrate, who then relied upon that information in finding probable cause

for a search warrant. In addressing the defendant's qualified immunity defense, the court stated as follows:

> [N]o reasonable officer could believe that it is constitutional to act dishonestly or recklessly with regard to the basis for probable cause in seeking a warrant. Accordingly, should a factfinder find against an official on this state-of-mind question, qualified immunity would not be available as a defense. . . . If he was reckless or deceitful in preparing the warrant affidavit, then he both violated Butler's rights and is not entitled to qualified immunity."

Id. at 1024. The court reversed the grant of summary judgment, holding that the plaintiff had made a substantial showing of actionable deception and materiality. *Id.* at 1025-26.

The Petitioners respectfully contend that under the legal principles applied by the Second, Third, and Ninth Courts of Appeal, based on this Court's decisions in *Franks*, *Leon*, and *Malley*, the decision of the District Court in this case, denying the Respondent's motion for summary judgment based upon qualified immunity, would have been affirmed. The same is true for virtually every other U.S. Courts of Appeal. *See, e.g.*, *Aponte Matos v. Toledo Davila*, 135 F.3d 182 (1st Cir. 1998) (reversing summary judgment in favor of officer where genuine issue of material fact existed as to whether officer obtained search warrant through use of material falsified facts); *Kelly v. Curtis*, 21 F.3d 1544 (11th Cir. 1994) (officer not entitled to qualified immunity from § 1983 malicious prosecution claim due to affirmative misstatement in arrest warrant); *Bruning v. Pixler*, 949 F.2d 352 (10th Cir. 1991) (plaintiff came forward with specific evidence from which jury could infer that defendants recklessly made false statements in, and omitted material information from, their affidavits in support of an arrest warrant); *Hale v. Fish*, 899 F.2d 390 (5th Cir. 1990) (officers who presented affidavit with material misrepresentations and omissions to magistrate in support of arrest warrant were not entitled to qualified immunity); *Hill v. McIntyre*, 884 F.2d 271 (6th Cir. 1989) (directed verdict for officer improper where

genuine questions of material fact existed as to whether officer acted with reckless disregard for the truth in applying for search warrant); *and Olson v. Tyler*, 711 F.2d 277, 282 (7th Cir. 1985) ("[I]n cases in which suppression would be warranted [under *Leon*] because an officer was dishonest or reckless in preparing a warrant affidavit, that officer would not enjoy good faith immunity for civil damages.").

Not only is a decision by this Court necessary to bring the Fourth Circuit in line with the other U.S. Courts of Appeal, but it is also necessary to establish uniformity in the standard used by all Circuits in applying the *Franks* and *Leon* rule to claims of qualified immunity in § 1983 actions. For example, some U.S. Courts of Appeal hold that where an officer either intentionally or with reckless disregard for the truth provides false and misleading information to a magistrate in a warrant application, he has violated a clearly established constitutional right, and the shield of immunity is automatically lost, *see, e.g., Lippay v. Christos*, *supra* (3d Cir.). Others hold that the false, misleading or omitted information must be material or necessary to the finding of probable cause, *see, e.g., Butler v. Elle*, *supra* (9th Cir.). Still others hold that immunity is lost only where the judicial finding of probable cause is based solely on the false or misleading information, *see, e.g., Olson v. Tyler*, *supra* (7th Cir.). The Petitioners respectfully contend that such an important constitutional issue cries out for a uniform, nationwide standard, so that the Fourth Amendment will be applied equally to all.

In this case, as discussed with particularity in the *Statement of Facts*, the Petitioners produced substantial and credible evidence that the Respondent either intentionally or with reckless disregard for the truth provided false and misleading information to, and omitted clearly critical information from, his warrant application to the magistrate. Furthermore, the Fourth Circuit expressly stated that these numerous factual inaccuracies were "material" — meaning they had a natural tendency to affect the magistrate's decision to issue the warrant. Nonetheless, the Fourth Circuit ignored the majority rule among the U.S. Courts of Appeal, as discussed above, and engaged in its own evaluation

of whether it deemed the Respondent's conduct to be reasonable. (*See* App. A, pp. 13a-23a) The "magic question" in a qualified immunity analysis is whether the officer's conduct violated a clearly established statutory or constitutional right of which a reasonable officer would have known. *Harlow*, *supra*. Clearly, as recognized in virtually every other U.S. Court of Appeal, the Respondent's did. The Petitioners respectfully contend that Isidro's Fourth Amendment rights should be no different than those of Richard Lippay in Pennsylvania, Neil Butler in Idaho, or Anthony Golino in Colorado. (*see supra*).

(b) ***The Fourth Circuit's decision directly conflicts with decisions of this Court regarding the standard for summary judgment, and decisions of other U.S. Courts of Appeal applying these standards in the context of a claim for qualified immunity in a § 1983 action.***

Not only does the Fourth Circuit's opinion conflict with other U.S. Courts of Appeal on the issue of whether an officer who provides material false, misleading and incomplete information to a magistrate in support of a warrant application loses the protection of qualified immunity, but its freestanding analysis of the Respondent's overall "reasonableness" at the summary judgment stage invades the province of the jury and likewise conflicts with decisions of this Court and other U.S. Courts of Appeal.

In considering a motion for summary judgment, two long-standing legal principles apply. First, all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962). Second, summary judgment is only appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In the summary judgment context, whether a particular piece of information is "material" is a mixed question of law and fact.

See, e.g., TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 450, 96 S. Ct. 2126, 2132, 48 L. Ed. 2d 757 (1976).

The legal component of the "materiality" question asks whether the information is relevant to a particular issue in light of the controlling, substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). In this case, it is well established that under *Franks* and *Leon*, and the law of every other U.S. Court of Appeal (*see supra*), the submission of false, misleading and incomplete information to a magistrate in a warrant application is relevant to the question of qualified immunity. The factual aspect contemplates an inference as to whether the particular information would likely be given weight by one considering that question. *TSC Industries, supra* at 450, 96 S. Ct. at 2132. Consequently, the importance that a magistrate would place on material false, misleading omitted information in determining whether to issue an arrest warrant is a question of fact for the jury – not the Fourth Circuit.

In *Golino v. City of New Haven, supra*, the defendants contended they were entitled to qualified immunity as a matter of law because it was objectively reasonable for them to believe that if the warrant application was corrected to eliminate misrepresentations and disclose all of the omitted information, the revised affidavit would demonstrate probable cause to arrest the plaintiff. 950 F.2d at 871. Rejecting this contention, the Second Circuit concluded that the question of the "materiality" of the misrepresentations and omissions was a question for the jury to decide:

> This contention, which assumes that the omissions and misrepresentations were not material, hardly views the facts in the light most favorable to Golino as is required on a motion for summary judgment. . . .
>
> * * *
>
> Plainly the information that was misrepresented or remained undisclosed in [defendants'] presentations in support of probable cause were not immaterial to

> that question as a matter of law. The weight that a neutral magistrate would likely have given the [misrepresented and omitted information] is not a legal question but rather is a question to be resolved by the finder of fact.

Id. at 871-72.

In *Hill v. McIntyre*, 884 F.2d 271 (6th Cir. 1989), the owner of a house subject to a police search filed a § 1983 action against, *inter alia*, the officer who obtained the search warrant, contending that the officer acted with reckless disregard for the truth in applying for the search warrant. The District Court granted a directed verdict in favor of the officer, and the plaintiff appealed. On appeal, the Sixth Circuit first noted that "[a]n action under §1983 does lie against an officer who obtains an invalid search warrant by making, in his affidavit, material false statements either knowingly or in reckless disregard for the truth. This standard originates in *Franks v. Delaware*. . . ." *Id.* at 275 (internal citations omitted).

In discussing the difference between a *Franks* analysis in the criminal context and the equivalent analysis in a civil § 1983 case, the Sixth Circuit held as follows:

> While the court is necessarily the factfinder in a *Franks* suppression hearing preliminary to a criminal trial, in a §1983 action factfinding under the *Franks* standard is the province of the jury. *Hindman v. City of Paris, Tex.*, 746 F.2d 1063, 1067 (5th Cir. 1984). Indeed, in a recent §1983 case our Circuit has held that the question whether the judicial officer issuing the warrant would have done so even without the knowingly or recklessly false statement is one for the jury, and we remanded the issue for trial. *Yancey v. Carroll County*, 876 F.2d 1238 (6th Cir. 1989).

Hill, supra at 275-76. The Sixth Circuit reversed, concluding that genuine questions of fact existed that precluded a directed verdict in the officer's favor. *Id.* at 276; *see also*, *DeLoach v. Bevers*, 922 F.2d 618, 623 (10th Cir. 1990) ("'The underlying issue in deciding whether the police had probable cause to do

what they did is reasonableness, which is also the underlying issue in deciding negligence — a classic jury issue.' This rule applies also to cases in which the officers made the misrepresentations in an application for an arrest warrant." (*quoting Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985) (*en banc*)).

In this case, the Fourth Circuit disregarded these axiomatic tenants of summary judgment. In its opinion, the Fourth Circuit affirmatively declared that it was not required to scrutinize the Respondent's conduct in the light most favorable to the Petitioners: "[T]o the extent that Atkins decided to discount certain conflicting evidence, such as Isidro's alibi, we need not accept such discounted evidence in the light most favorable to him." (*See* App. A, p. 12a) By *sua sponte* giving the Respondent the benefit of the doubt on the decisions he made, and deciding that those decisions were reasonable, the Fourth Circuit is in direct conflict with this Court's decision in *TSC Industries*, *supra*, and the Sixth Circuit's decision in *Hill v. McInytre*:

> It is up to a jury, not a judge, to decide whether the pillars and the lack of a garage are such salient features that they would make it less than reckless to select the house that exhibited them. Furthermore, ***it is up to a jury, not a judge, to evaluate McIntyre's decision not to ascertain which house's utilities were in Amy's name: the existence of a good reason to hurry does not make this less a question of fact.*** And finally, the Hills are entitled to attempt to convince a jury that McIntyre was reckless not merely in selecting the wrong house but selecting *any* house.

Hill, 884 F.2d at 276 (emphasis added); *see also*, *Hindman v. City of Paris, Tex.*, 746 F.2d 1063, 1067 (5th Cir. 1984) ("Unlike a criminal case, in a civil suit attacking the legality of an arrest, a *Franks v. Delaware* factual dispute is not preliminary to a ruling upon the admissibility of evidence. Rather, it presents a classic issue of historical fact central to the substantive issues.").

In this case, the Fourth Circuit recognized at least some of the "material factual inaccuracies" in the Respondent's warrant application. (*See* App. A, p. 8a) The Fourth Circuit acknowledged the importance of those misrepresentations to a finding of probable cause by affirmatively characterizing the false information as "material." *Pennsylvania v. Ritchie, supra*; *Kungys v. United, supra*. By recognizing these material misstatements and not analyzing the Respondent's qualified immunity claim in the context of *Franks* and *Leon*, the Fourth Circuit deviated from the other U.S. Courts of Appeal. Furthermore, to the extent the Fourth Circuit decided for itself that these "material factual inaccuracies" were irrelevant to the magistrate's decision to issue a warrant (which contradicts the legal definition of "material"), and that it was not required to analyze the Respondent's decisions and conduct in the light most favorable to the Petitioners, it again created a conflict among the Circuits. The Fourth Circuit did not consider the proper question of whether the Respondent's conduct violated a well-established constitutional right of which a reasonable officer should have known, *Harlow v. Fitzgerald, supra*, but simply took its own view of the facts and concluded that the Respondent acted reasonably.[4]

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4. In any event, the Fourth Circuit's own "reasonableness" evaluation is flawed. For example, the Fourth Circuit asserts that the Respondent was "entitled to disbelieve Isidro's alibi." (App. A, p. 19a) At his deposition, before consulting with his counsel on the issue, the Respondent stated that he had done nothing to investigate Isidro's alibi and was never able to refute Isidro's alibi. (Deposition of W.J. Atkins, p. 115) The Fourth Circuit also relied on the fact that the Respondent sought the approval of his superior officers before seeking an arrest warrant. (App. A, p. 20a) In fact, the information the Respondent provided to his fellow officers was the same false, misleading and incomplete information he provided to the magistrate. Furthermore, none of these other officers made any effort to verify the information provided by the Respondent, and they simply accepted as true what the Respondent told them. The Fourth Circuit also focused on the state district court probable cause hearing, which the Court concluded "afforded Isidro a full opportunity to litigate, in an adversary proceeding before an impartial

(Cont'd)

CONCLUSION

Based upon the foregoing, the Petitioners respectfully request that this High Court issue a Writ of Certiorari to review the decision of the Fourth Circuit Court of Appeals in this matter, for the purpose of resolving the conflict with the other U.S. Courts of Appeal created by the Fourth Circuit's decision and pronouncing, for the first time, a uniform, nationwide standard for applying the important constitutional principle adopted in *Franks v. Delaware*, *supra*, and *United States v. Leon*, *supra*, to claims for qualified immunity in civil § 1983 actions.

Respectfully submitted,

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(Cont'd)
judge, the issue of probable cause." (App. A, p. 22a) The uncontroverted evidence below was that strategic concerns inherent in such a preliminary hearing make it impossible to fully litigate the issue of probable cause. Because, by statute, the decision of the district court judge is not binding on the State (which can proceed with an indictment even upon a finding of no probable cause), a criminal defendant has too much to lose by exposing his defense case. Moreover, Isidro's attorney had no opportunity to review or test the physical evidence prior to the probable cause hearing.

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED JULY 11, 2002

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-2112

ISIDRO GOMEZ; LINDA L. GOMEZ, Wife,

Plaintiffs-Appellees,

v.

W.J. ATKINS, in his official and individual capacity,

Defendant-Appellant,

and

EARL MOOSE BUTLER, Sheriff of Cumberland County, in his official and individual capacity; H.R. COLLINS, in his official and individual capacity; JERRY D. WEBSTER, in his individual capacity; WESTERN SURETY COMPANY; DEBRA KOENIG,

Defendants.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, Senior District Judge.
(CA-99-611-5-BR)

Appendix A

Argued: April 2, 2002

Decided: July 11, 2002

Before WILKINSON, Chief Judge, KING, Circuit Judge, and HAMILTON, Senior Circuit Judge.

OPINION

KING, Circuit Judge.

Appellee Isidro Gomez ("Isidro") initiated this proceeding in the Eastern District of North Carolina under the provisions of 42 U.S.C. § 1983. He contended that Sergeant W.J. Atkins of the Cumberland County Sheriff's Department (the "Sheriff's Department") violated his constitutional rights by causing him to be charged and arrested, without probable cause, for the murder of his wife. He also asserted various related state law claims. Sergeant Atkins sought summary judgment in the district court, claiming qualified immunity. When the court declined to recognize his immunity claim, he filed this interlocutory appeal. As explained below, we vacate and remand for dismissal.

I.

In July 1980, Rickie Jean Gomez, Isidro's first wife, was murdered in Fayetteville, North Carolina.[1] In the latter half of 1980, the Sheriff's Department conducted a lengthy

1. In the record, Mrs. Gomez's name is spelled as either "Rickie" or "Ricki." Following the example of the parties and the district court, we utilize "Rickie," except when the alternative is present in quotations.

investigation of the crime, but it bore no fruit and lapsed into inactivity (the "Initial Investigation"). The investigation of the unsolved homicide was resurrected in 1995, and a follow-up investigation (the "Follow-up") was conducted under the auspices of Sergeant Atkins. A few months later, in May 1996, Isidro, who had re-married in 1981, was charged with the murder of his first wife. Following proceedings in the Cumberland County District Court, Isidro was indicted for first degree murder. The indictment was subsequently dismissed, and this civil litigation ensued. The factual predicate for these proceedings is explained more fully below.

A.

In its Initial Investigation, the Sheriff's Department learned that Rickie Jean had married Isidro in 1968 and that the couple made their home in Fayetteville. By 1979, Isidro and Rickie Jean were experiencing marital problems and they were, at times, living separately. In July 1980, Isidro sought a reconciliation, and they met at her sister's home in Atlanta, Georgia, on Friday, July 11, 1980. At the end of the weekend, on July 13, 1980, Isidro and Rickie Jean departed Atlanta on their return to Fayetteville. After travelling only seven or eight miles, Isidro's vehicle broke down. Because the necessary repair parts were unavailable, Isidro asked a friend, James Horton, to pick them up and tow the car to Horton's home in an Atlanta suburb. Horton and his wife then invited the couple to spend the night, but Rickie Jean declined because she was scheduled to work in Fayetteville the next day. Thus, after dinner, Isidro and Horton transported Rickie Jean to the Atlanta airport, and she returned to Fayetteville by plane. Isidro spent Sunday evening in Georgia with the Hortons.

Appendix A

On Monday morning, July 14, 1980, Horton's wife took Isidro to obtain parts for the repair of his car. Isidro then made the necessary repairs and, between 10:00 and 10:30 a.m., he departed for Fayetteville. The distance between the Hortons' home near Atlanta and the Gomez home in Fayetteville is approximately 376 miles. At about 6:20 p.m., Rickie Jean's supervisor at Piedmont Airlines (her employer), called Isidro at the Gomez home, advising him that, although Rickie Jean had arrived in Fayetteville on a Sunday-evening flight, she had not reported for work Monday morning.

Around 7:00 p.m. on July 14, 1980, after consulting with a neighbor, Isidro called the local police and reported that Rickie Jean was missing. Law enforcement officers arrived at the Gomez home a few minutes later, and a crime scene investigation was conducted. There were no signs of robbery or forced entry into the home, but the investigators discovered blood in and around the master bedroom, a large blood stain on the underside of the mattress, and bloody shoe prints in the driveway. Upon removing the blood-soaked mattress from the bedroom, investigators noticed that Isidro was not distraught, and that he seemed unconcerned that his wife was missing and possibly dead. That evening, Isidro went to the County Law Enforcement Center to be interviewed.

At approximately 10:20 the next morning, July 15, 1980, deputies located Rickie Jean's car, with her dead body inside, in a wooded area about a mile from the Gomez home. She was wearing a nightgown, and the investigators found bed linen from the master bedroom in her car. An autopsy revealed that Rickie Jean had been badly beaten and stabbed in the chest. The time of her death was established as being

six to thirty-six hours prior to the discovery of her body, i.e., between 10:00 p.m. on Sunday, July 13, and 4:00 a.m. on Tuesday, July 15, 1980.

During the Initial Investigation, Isidro provided the Sheriff's Department with blood and hair samples. Tests on the evidence found at the Gomez home revealed the presence of both Types O and A blood, the types of Rickie Jean and Isidro, respectively. Blood found under Rickie Jean's fingernails was the same type as Isidro's. Loose hairs found on Rickie Jean's body were "microscopically consistent" with Isidro's hair. Investigators also discovered that Rickie Jean had advised several of her friends that Isidro had previously subjected her to physical abuse and beatings, and that he had threatened to kill her.

Throughout his interviews with the Sheriff's Department, Isidro maintained that he had not arrived home in Fayetteville until 6:00 p.m. on July 14, 1980, and that Rickie Jean's car was not there when he arrived. Shortly thereafter, according to Isidro, he noticed small blood stains in the house. After receiving a phone call from Rickie Jean's supervisor, Isidro called friends and relatives in an effort to locate Rickie Jean. Then, upon going outside to the driveway, he first noticed a large brownish stain which turned out to be blood. Isidro denied that he was involved in the death of Rickie Jean, maintaining that it was impossible for him to have returned from Atlanta in time to commit the murder and dispose of her body. On July 18, 1980, Isidro was subjected to a polygraph examination on the matter, which he failed.

Appendix A

After the Initial Investigation, no charges were brought in connection with the murder of Rickie Jean. In May 1981, ten months after the murder, Isidro married his current wife and, because of a job transfer, moved to Michigan. Due to subsequent transfers, Isidro and his new wife, Linda, moved to Kentucky and finally to Virginia. All the while, the homicide investigation of Rickie Jean's death remained pending and unsolved in the Sheriff's Department.

B.

In 1994, fourteen years after the murder of Rickie Jean, Earl "Moose" Butler was elected Sheriff of Cumberland County. After taking office, Sheriff Butler directed Sergeant Atkins to review the County's unsolved homicide cases, including that of Rickie Jean. In November 1995, after reviewing the file on the Initial Investigation, Atkins travelled to Virginia and interviewed Isidro. Isidro relayed to Atkins essentially the same version of events he had provided the Sheriff's Department in 1980. Over the next six months, Atkins also interviewed relatives, friends, and co-workers of Rickie Jean, both in person and by phone. In all, he obtained the oral and written statements of at least seventeen persons. Numerous individuals advised Atkins that Rickie Jean claimed that Isidro had physically abused her, and that he had threatened to kill her. For example, Sabrina Ross, a friend of Rickie Jean, reported to Atkins that on one occasion Isidro "had choked [Rickie Jean], threw her on the floor and slapped her in the face," and that in a separate incident he "threw her against the wall and caused her to [miscarry] their first child." Ross also stated that Isidro repeatedly told Rickie Jean that he would kill her. Another

witness informed Atkins about seeing bruises "around [Rickie Jean's] neck, her ribs, arms, and on her back." Additionally, her friends informed Atkins that Rickie Jean and Isidro were each engaged in extramarital love affairs. According to a person who spoke with Rickie Jean the night before she left to meet Isidro in Atlanta, she was planning to tell him about a romantic relationship with another man. Atkins also learned that Rickie Jean and Isidro were engaged in a dispute over the custody of their two children. And one witness informed Atkins that Isidro had said "he would kill [Rickie Jean] before she got the kids."

In April 1996, at Atkins's request, Isidro provided new blood and hair samples to the Sheriff's Department, and it conducted DNA testing. The Laboratory Corporation of America ("LabCorp") then compared the DNA material found under Rickie Jean's nails with Isidro's DNA profile, but the results failed to inculpate Isidro (the "LabCorp DNA Report").

C.

Based on both the Initial Investigation and the Follow-up conducted in 1995 and 1996, Sergeant Atkins then drafted a six-page Statement of Investigating Officer in Detail (the "Report"), which purported to summarize the facts surrounding the death of Rickie Jean and the evidence pointing to Isidro as the culprit. The Report stated that loose hairs found on Rickie Jean were consistent with Isidro's body hair, and that blood found under Rickie Jean's fingernails was of the same type as Isidro's. After noting Isidro's contention that he did not return to Fayetteville until 6:00 p.m.

on July 14, 1980, the Report observed that Isidro could have arrived earlier without exceeding the speed limit. Additionally, the Report recounted that Isidro and Rickie Jean were each engaged in extramarital affairs, and that there was an ongoing dispute between them over the custody of their children. Finally, it observed that Isidro failed to show remorse over his wife's death, and that he had failed the polygraph examination relating to the investigation.[2]

On May 14, 1996, Sergeant Atkins met with his supervisors and the legal advisor for the Sheriff's Department (attorney Deborah Koenig), for the purpose of discussing the homicide investigation and how he should proceed with it.[3] Atkins reviewed with them the evidence from the Initial Investigation and the additional evidence acquired in the Follow-up. He had concluded that there was sufficient evidence to charge Isidro with the murder of Rickie Jean, and his supervising officers and the legal advisor agreed.

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2. Sergeant Atkins's Report also contained at least three material inaccuracies. First, it stated that Isidro's shoe size was the same as that found in a bloody footprint in the driveway at the crime scene. Second, it asserted that witnesses had spoken with Isidro in Fayetteville at 3:00 on Monday afternoon, when the witness statements from the Initial Investigation indicated that the first such conversation occurred at 6:20 p.m. Third, relying on statements of officers who had travelled from Atlanta to Fayetteville, the Report stated that the drive could be completed in four-and-a-half to five hours without exceeding the speed limit, when in fact the trip would take approximately seven hours without speeding.

3. Sheriff Butler was not present at the meeting, but the Chief Deputy, Chief Detective, and other supervising officers from the Sheriff's Department attended.

Appendix A

Before seeking an arrest warrant for Isidro, Sergeant Atkins prepared an affidavit, in which he stated that "based upon the original investigation in 1980 and upon the continuing investigation from 1995 to 1996," Isidro "caused the death of his wife Ricki Jean Gomez." Prior to executing his affidavit, Atkins reviewed its contents with attorney Koenig, who responded that "it look[s] good to me." Atkins then presented the affidavit to a magistrate in the Cumberland County District Court, seeking issuance of an arrest warrant. The magistrate, on May 14, 1996, issued a murder warrant for Isidro, based on the "information furnished under oath," and Isidro was arrested at his home in Chesterfield, Virginia. He was then transported to Cumberland County, and on May 24, 1996, he was released on bond.

D.

After being arrested for the murder of his wife, Isidro retained lawyer Bobby Deaver of Fayetteville as his counsel. At a two-day probable-cause hearing conducted in the district court in September 1996, the issue of probable cause was litigated.[4] In support thereof, the prosecution presented the testimony of six witnesses, photographs of the blood evidence found in the driveway and master bedroom of the Gomez home, as well as the autopsy report and its accompanying photographs. One of the two testifying law officers read

4. The conduct of a probable-cause hearing in North Carolina is governed by N.C. Gen. Stat. § 15A-606(a). The purpose of such a hearing is "to determine whether the accused should be discharged or whether sufficient probable cause exists to bind the case over to superior court and to seek an indictment against the defendant." *State v. Sellars*, 278 S.E.2d 907, 913 (N.C. Ct. App. 1981).

Appendix A

Isidro's July 15, 1980, statement into the record, spelling out Isidro's version of the events. During the hearing, attorney Deaver cross-examined the State's witnesses and, in response to the State's case, he presented evidence on behalf of Isidro, consisting of a statement by an alibi witness and the exculpatory LabCorp DNA Report. At the conclusion of the hearing, on September 27, 1996, the district court found "there is probable cause to believe that Ricki Jean Gomez was murdered on or about the 14th day of July, 1980, and that there is probable cause to believe that the defendant, Isidro Gomez, committed that offense of murder in the first degree." The next month, the district attorney sought, and the grand jury returned, a single-count indictment against Isidro, charging him with first degree murder in the death of Rickie Jean.

Following the indictment, while Isidro was on bond, the State's position on his case changed. In October 1996, LabCorp conducted additional DNA tests on fingernail scrapings from Rickie Jean, and it was determined that Isidro was "excluded as a possible contributor to the genetic material in this sample." Thereafter, the Sheriff's Department submitted Isidro's hair sample and loose hairs found on Rickie Jean's body to the FBI Laboratory. In its Report of September 30, 1997, the FBI determined that the hairs examined and compared were microscopically dissimilar, and it also concluded that some of the loose hairs on Rickie Jean's body, initially believed to belong to Isidro, were carpet fiber. Faced with the burden of proving Isidro's guilt beyond a reasonable doubt, the district attorney concluded that there was "insufficient evidence to continue the prosecution" and, on January 13, 1998, he dismissed the indictment. No further charges have been preferred.

Appendix A

E.

On September 10, 1999, Isidro and Linda Gomez filed this § 1983 suit against Sergeant Atkins, Sheriff Butler, and certain other officers, in both their official and individual capacities.[5] Their Complaint alleged, inter alia, that Atkins and Butler had violated Isidro's Fourth Amendment right to be free from unreasonable seizure. Isidro's present wife, Linda Gomez, sought damages for loss of consortium.

On November 17, 2000, Sergeant Atkins and Sheriff Butler filed a joint motion for summary judgment, maintaining that they were entitled to qualified immunity for their actions in the investigation and arrest of Isidro. Conversely, Isidro asserted that qualified immunity was inappropriate because, after considering his alibi and correcting the errors in Atkins's Report, no reasonable officer could believe there was probable cause to arrest him. On December 27, 2000, Isidro dismissed all the claims against Butler in his individual capacity, rendering Butler's claim of qualified immunity moot. On August 27, 2001, the district court issued

5. In addition to Sergeant Atkins and Sheriff Butler, the Complaint named the following as defendants: Detective Sheriff H.R. Collins of the Cumberland County Sheriff's Department, Jerry D. Webster of the North Carolina State Bureau of Investigation, and Western Surety Company. An Amended Complaint, filed July 17, 2000, named Ms. Koenig, the legal advisor, as a defendant. The plaintiffs thereafter dismissed Collins, Webster, and Koenig. They did not sue the district attorney, the magistrate, the district court judge, or the grand jury. *See Wadkins v. Arnold*, 214 F.3d 535, 538 n.5 (4th Cir. 2000) (explaining that judicial officers acting in their judicial capacities and prosecutors authorizing prosecution are protected by absolute immunity).

its Order denying Atkins's qualified immunity claim. *Gomez v. Butler*, Order, No. 5:99-CV-611-BR(2) (E.D.N.C. Aug. 27, 2001) (the "Order"). The court concluded, inter alia, that the evidence was insufficient to establish probable cause to charge Isidro and that "a reasonable officer could not have believed that there was probable cause to seek an arrest warrant under the circumstances." *Id.* at 17. Atkins then appealed to this Court from the denial of his immunity claim, and, on September 20, 2001, the district court proceedings were stayed pending our review of his claim. We possess jurisdiction pursuant to the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Wadkins v. Arnold*, 214 F.3d 535, 536 n.1 (4th Cir. 2000).

II.

We review de novo a district court's denial of qualified immunity. As a general proposition, in assessing a qualified immunity claim, a court must view the facts in the light most favorable to the party asserting the injury. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). As such, to the extent that there is a factual dispute concerning what Sergeant Atkins knew after conducting his Follow-up investigation, we must resolve any such dispute in the light most favorable to Isidro. However, to the extent that Atkins decided to discount certain conflicting evidence, such as Isidro's alibi, we need not accept such discounted evidence in the light most favorable to him. Were we compelled to accept an alibi that a law officer has declined to credit, the officer could never be deemed to have acted reasonably, and we would eliminate any possibility of qualified immunity in a § 1983 case. Instead, as we explain more fully below, to the extent that Atkins discounted Isidro's

alibi or interpreted certain evidence, our review must assess whether, in so doing, he acted in an objectively reasonable manner, i.e., whether an objective officer could have reasonably believed there was probable cause for an arrest. *Torchinsky v. Siwinski*, 942 F.2d 257, 260 (4th Cir. 1991).

III.

A.

Public officials engaged in the performance of discretionary functions are entitled to qualified immunity from civil liability to the extent "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Trulock v. Freeh*, 275 F.3d 391, 399 (4th Cir. 2001). The Supreme Court has recognized that such immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In particular, as we have spelled out with specificity, qualified immunity protects law officers from "bad guesses in gray areas," and it ensures that they may be held personally liable only "for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

In an appeal from the denial of a qualified immunity claim, our first task is to ascertain whether the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also Clem v. Corbeau*, 284 F.3d 543, 549 (4th Cir. 2002). If the answer to this inquiry is "no," the analysis ends and the plaintiff cannot prevail.

If the answer is "yes," we must then consider whether, at the time of the violation, the constitutional right was clearly established, that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 201-02; *see also Taylor v. Waters*, 81 F.3d 429, 433 (4th Cir. 1996) (quoting *Gordon v. Kidd*, 971 F.2d 1087, 1093 (4th Cir. 1992)).

B.

The § 1983 claim being pursued by Isidro is, in substance, that Sergeant Atkins violated his Fourth Amendment right not to be arrested without probable cause. Isidro contends that, in seeking the arrest warrant, Atkins ignored exculpatory evidence and made false statements in support of the warrant application. Isidro maintains that Atkins sought the arrest warrant despite the fact that there were no indicia of probable cause, and he further maintains that Atkins's misstatements initiated the improper prosecution. In our assessment of whether Atkins is entitled to qualified immunity, however, the question is not whether there actually was probable cause for the murder warrant against Isidro, but whether an objective law officer could reasonably have believed probable cause to exist. *Torchinsky v. Siwinski*, 942 F.2d 257, 260 (4th Cir. 1991). As the Supreme Court stated in *Malley v. Briggs*, "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost." (citations omitted). 475 U.S. at 344-45. In *Anderson v. Creighton*, the Court set forth the underlying rationale for this favorable standard, observing that "[i]t is inevitable that law enforcement officials will in some cases reasonably but

mistakenly conclude that probable cause is present, and . . . like other officials who act in ways they reasonably believe to be lawful[,] [they] should not be held personally liable." 483 U.S. 635, 641 (1987).

C.

In assessing whether probable cause existed when the murder warrant against Isidro was issued, we must "examine the totality of the circumstances known to the officer at the time of the arrest." *Taylor*, 81 F.3d at 434 (citing *United States v. Al-Talib*, 55 F.3d 923, 931 (4th Cir. 1995)). We are guided in this endeavor by certain fundamental principles. First, the determination and existence of probable cause is a "practical, nontechnical conception," and it involves "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). Furthermore, in determining whether probable cause exists, the evidence "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

Probable cause will be found to exist when "the facts and circumstances within an officer's knowledge — or of which he possesses reasonably trustworthy information — are sufficient in themselves to convince a person of reasonable caution that an offense has been or is being committed." *Wadkins v. Arnold*, 214 F.3d 535, 539 (4th Cir. 2000) (citing *Brinegar*, 338 U.S. at 175-76). While probable cause demands "more than a mere suspicion, . . . evidence sufficient to convict is not required." *Taylor*, 81 F.3d at 434 (citing

Wong Sun v. United States, 371 U.S. 471, 479 (1963)). And reasonable law officers need not "resolve every doubt about a suspect's guilt before probable cause is established." *Torchinsky*, 942 F.2d at 264 (citation omitted). While officers "may not disregard readily available exculpatory evidence . . . the failure to pursue a potentially exculpatory lead is not sufficient to negate probable cause." *Wadkins*, 214 F.3d at 541.

IV.

In order for Sergeant Atkins to successfully claim qualified immunity in this case, the information within his knowledge at the time of the warrant application had to justify a reasonable belief that Isidro probably caused the death of Rickie Jean. Contrary to the conclusion of the district court, our assessment of the information connecting Isidro to the crime compels the view that the warrant application was not "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986). In the circumstances of the case, Atkins did not transgress any bright lines, *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992), and to the extent he made mistakes, they are entirely insufficient to render him liable to a § 1983 action. *Torchinsky v. Siwinski*, 942 F.2d 257, 261 (4th Cir. 1991). Our analysis of the record here leads us inexorably to this conclusion. Isidro possessed a strong motive to harm or kill Rickie Jean; he had the opportunity to commit the crime; he was linked to the murder by physical evidence; and Atkins was entitled to disbelieve his alibi. From a procedural standpoint, Atkins acted in a prudent manner, and his view of the probable cause question passed muster in state court. We explain our analysis more fully below.

Appendix A

A.

1.

First, both the Initial Investigation and the Follow-up revealed that Isidro possessed a strong motive to injure Rickie Jean, and that he had made prior threats to both harm and kill her. *See Matter of Extradition of Kraiselburd*, 786 F.2d 1395, 1399 (9th Cir. 1986) (stating that "evidence of appellant's motive and threats amply supports a finding of probable cause"). Friends of Rickie Jean had informed Sergeant Atkins that both she and Isidro were engaged in extramarital affairs. According to a witness who spoke with Rickie Jean the night before she met Isidro in Atlanta, "she was going to tell [Isidro] about her relationship with [another man]."

Additionally, the Initial Investigation revealed, and Sergeant Atkins was advised by several witnesses, that Isidro had repeatedly physically abused and threatened to kill Rickie Jean. Isidro and Rickie Jean were engaged in violent disputes over who should have custody of their children, and Isidro had said "he would kill [Rickie Jean] before she got the kids." As those "versed in the field of law enforcement" well know, *see Illinois v. Gates*, 462 U.S. 213, 232 (1983), it is common for death threats to be made in domestic violence matters. Unfortunately, they are too often carried out, resulting in serious injury and death.

2.

Second, based on the information in the hands of Sergeant Atkins, Isidro possessed an ample opportunity to commit the

brutal murder of his wife. He had departed from Atlanta as early as 10:00 a.m. on July 14, 1980, and the police did not arrive at the Gomez home until after 7:00 that evening. Isidro thus had a nine-hour window, before calling the authorities, within which to travel from Atlanta to Fayetteville, kill his wife, and then dispose of her body. Indeed, he admits being at the murder scene by 6:00 p.m., at least an hour before he called the authorities.[6]

3.

Third, while it was not overly compelling, some of the available physical evidence linked Isidro to the crime. Although the LabCorp DNA Report concluded that material found under Rickie Jean's fingernails did not match Isidro's DNA profile, other blood evidence could be reasonably construed to connect Isidro to the crime. Rickie Jean had Type O blood, yet Type A blood (Isidro's type) was found in the master bedroom where she was murdered. More importantly, Type A blood was found under Rickie Jean's fingernails. And, at the time the warrant was issued, loose hairs found on Rickie Jean's body were determined to be microscopically consistent with Isidro's hair. Finally, investigators at the crime scene believed that Isidro had conducted himself in a strange manner, and that he had failed to express grief or remorse, despite the fact that his wife was missing and the evidence indicated that foul play had occurred.

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6. It is of additional significance that Rickie Jean was murdered in her own home, and that there were no signs of forced entry or robbery.

4.

Fourth, Sergeant Atkins was entitled to disbelieve Isidro's alibi. And to the extent that the alibi was deemed false, it was also reasonable for Atkins to view it as inculpatory. *See United States v. Mojica-Baez*, 229 F.3d 292, 306 (1st Cir. 2000) (explaining that "false alibi was itself evidence of guilt"). In both 1980 and 1995, Isidro claimed that he drove no faster than the speed limit from Atlanta to Fayetteville, and that he did not arrive home until 6:00 p.m. on July 14. Thus, Isidro maintained that he did not have a sufficient opportunity to murder Rickie Jean and move her body before the authorities arrived in response to his 7:00 p.m. phone call. A reasonable officer, however, was not obliged to credit Isidro's exculpatory story. For example, if Isidro departed Atlanta at 10:00 a.m., and if he averaged sixty-five miles per hour, he could have stopped for fuel and still arrived in Fayetteville by 4:00 p.m.[7] Thus, Isidro could reasonably be placed at his home more than two hours before he claims to have arrived. And, although such results are generally not admissible in a criminal trial, Isidro had failed a polygraph examination in connection with his version of events.[8] Thus,

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7. In order to drive from Atlanta to Fayetteville, Isidro took Interstate 20 East to Florence, South Carolina, and then proceeded North on Interstate 95, a distance of approximately 376 miles. If he drove at the then fifty-five mile per hour speed limit, the trip would have taken about seven hours, placing him in Fayetteville as early as 5:00 p.m. If he averaged seventy miles per hour, however, he would have completed the trip in less than five-and-a-half hours, and he would have been home in Fayetteville prior to 3:30 p.m.

8. While polygraph results are generally not admissible at trial, such tests are a well-recognized law enforcement technique, and a

(Cont'd)

an objectively reasonable officer was entitled to conclude that Isidro was providing the authorities with a false alibi.

B.

It is important to our analysis that Sergeant Atkins conducted himself, from a procedural standpoint, in a prudent and deliberate manner. After carrying out his Follow-up investigation, he drafted a written Report and, before seeking judicial action against Isidro, he presented the case to his supervisors and the legal advisor of the Sheriff's Department. After receiving their supportive opinions, he provided his proposed affidavit to the Department's legal advisor for her review. It was only after following these "in-house" review procedures that Atkins presented the affidavit to the magistrate and sought the issuance of a murder warrant against Isidro. *See Wadkins v. Arnold*, 214 F.3d 535, 541-42 (4th Cir. 2000) (recognizing that officer's "conference with the Commonwealth's Attorney and the subsequent issuance of the warrants by a neutral and detached magistrate weigh heavily toward a finding that [officer] is immune").

In our assessment of objective reasonableness, it is also significant that Atkins arrested Isidro only after first seeking and procuring the approval of a detached district court magistrate. This was the proper course of action on his part. As Chief Judge Wilkinson astutely observed in our *Torchinsky*

(Cont'd)

reasonable officer might take their results into account in assessing probable cause. *See United States v. Trenkler*, 61 F.3d 45, 58 (1st Cir. 1995) (recognizing that law enforcement officers rely on polygraph examinations even though they are generally not admissible).

decision, while the issuance of an arrest warrant does not provide per se evidence of objective reasonableness, a law officer's "actions in seeking [an] arrest warrant[ ] and the magistrate's determination of probable cause provide additional support for his claim that he acted with objective reasonableness." *Torchinsky*, 942 F.2d at 262.

C.

Finally, and perhaps of most significance to our assessment of Sergeant Atkins's qualified immunity claim, we must take account of the comprehensive probable-cause hearing conducted on the murder charge made against Isidro. During the two-day hearing in September 1996, the district court judge heard and evaluated the testimony of the State's six witnesses, all of whom were cross-examined by Isidro's retained counsel. One of the witnesses read Isidro's July 15, 1980, statement, containing his version of the events, to the judge. During the hearing, the prosecution presented photographic and medical evidence relating to the crime, and Isidro's counsel countered with an alibi statement and the exculpatory LabCorp DNA Report. After reviewing and considering this evidence and the argument of counsel, the judge reached the same conclusion as had the magistrate, finding "that there is probable cause to believe that the defendant, Isidro Gomez, committed that offense of murder in the first degree," and the court bound Isidro over for grand jury proceedings. And following the court's probable-cause ruling in favor of the prosecution, the district attorney successfully secured an indictment from the Cumberland County grand jury, charging Isidro with the first degree murder of Rickie Jean Gomez.

Appendix A

The district court, in denying Sergeant Atkins's qualified immunity claim, placed substantial reliance on the errors found in his Report, *see supra* note 2, and it emphasized the potential that those with whom Atkins dealt may have been misled by the Report.[9] Order at 12-13. The probable-cause hearing, however, afforded Isidro a full opportunity to litigate, in an adversary proceeding before an impartial judge, the issue of probable cause. After the State presented its evidence, and after Isidro's counsel cross-examined the witnesses and introduced exculpatory evidence, the district court judge (who, not having reviewed the Report, could not have been influenced by any errors therein) found probable cause for the murder charge.

The Supreme Court, in *Malley v. Briggs*, emphasized that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." 475 U.S. 335, 341 (1986). In this case, Isidro has failed to forecast any evidence establishing that the Report was intentionally falsified by Sergeant Atkins. As we explained in *Torchinsky*, "[i]f reasonable mistakes were actionable, difficult questions of discretion would always be resolved in favor of inaction, and effective law enforcement would be lost." 942 F.2d at 261. The conduct complained of here fails to demonstrate either incompetence

9. According to Sergeant Atkins, he provided his Report to the magistrate, along with his affidavit, in seeking the arrest warrant. The Report was unsworn, however, and in issuing the warrant the magistrate relied only on information "furnished under oath." Nothing in the record indicates that the district court judge had access to or reviewed the Report prior to his finding of probable cause.

or a knowing violation of the law and, in these circumstances, Atkins's immunity claim must be recognized.[10]

V.

Pursuant to the foregoing, we vacate the Order of the district court, and we remand for dismissal.

VACATED AND REMANDED.

10. Atkins also asserts that Isidro is collaterally estopped from asserting that there was no probable cause for his arrest, because that issue was fully litigated in the probable-cause hearing before the Cumberland County District Court. Because Atkins is entitled to qualified immunity, we need not address his collateral estoppel contention.

Appendix A

HAMILTON, Senior Circuit Judge, concurring:

For the reasons expressed by the court today, I agree with the court that Sergeant Atkins is entitled to qualified immunity because, notwithstanding the factual inaccuracies in Sergeant Atkins' report, an objective law enforcement officer reasonably could have believed that probable cause existed for the arrest of Isidro. Therefore, I join the court's opinion.

I write separately only to express my disdain for Sergeant Atkins' inclusion of the material factual inaccuracies, described in Footnote 2 of the court's opinion, in his report. These material factual inaccuracies, which dealt with the heart of the State's case, *i.e.*, whether Isidro murdered his first wife, should not have been in Sergeant Atkins' report. While the presence of these material factual inaccuracies in the report do not prevent Sergeant Atkins from invoking qualified immunity, it is nevertheless a disturbing commentary on the manner in which law enforcement activities are conducted in Cumberland County, North Carolina.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION DATED AUGUST 27, 2001 AND FILED AUGUST 28, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:99-CV-611-BR(2)

ISIDRO GOMEZ and wife, LINDA L. GOMEZ,

Plaintiffs,

v.

EARL BUTLER, Sheriff of Cumberland County, in his official capacity, W.J. ATKINS, in his official and individual capacity, and WESTERN SURETY COMPANY, a bonding company licensed to conduct business in North Carolina,

Defendants.

ORDER

This matter comes before the court on the joint motion for summary judgment filed by defendants Sheriff Earl Butler and W.J. Atkins. Plaintiffs have filed a response and defendants have filed their respective replies. Also before the court is defendants' joint motion for leave to file the affidavit of Cuyler

L. Windham and plaintiffs' motion to strike the same. These motions have also been fully briefed. These matters are ripe for disposition.

I. INTRODUCTION

This is an action for compensatory and punitive damages brought pursuant to the provisions of 42 U.S.C. § 1983 and based upon the alleged wrongful arrest and prosecution of plaintiff Isidro Gomez for the murder of his wife Rickie Jean Gomez thereby resulting in a violation of his rights under the United States Constitution. Plaintiff Isidro Gomez also asserts state law claims of civil conspiracy, abuse of process, malicious prosecution, and intentional and negligent infliction of emotional distress arising out of the same conduct and occurrences. In addition, plaintiff Linda Gomez, Isidro's current wife, seeks compensatory damages for loss of consortium. While plaintiffs' complaint has previously named other defendants,[1] at the time of this order, the only remaining defendants include Sheriff Earl Butler, in his official capacity, W.J. Atkins, in both his official and individual capacity, and Western Surety Company.

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1. At the time of this order, plaintiffs had voluntarily dismissed defendants Collins, Webster, and Koenig and all claims against Sheriff Butler in his individual capacity.

Appendix B

II. BACKGROUND

A. Isidro and Rickie Jean Gomez[2]

Isidro and Rickie Jean were married in September 1968. (I. Gomez Aff. ¶ 3 — AP4790.[3]) Two sons were born of the marriage in 1969 and 1976. (*Id.*) Sometime in the late 1970's, Isidro and Rickie Jean began experiencing problems with their marriage and, by June of 1980, they had been living separately for approximately a year and a half. (*Id.* ¶ 5 — AP4791.) During this separation, Isidro had custody of the children. (*Id.* ¶ 7 - AP4791.)

B. Weekend in Atlanta

In June of 1980, Rickie Jean suggested that Isidro take the boys to Texas to spend the summer with Isidro's family so that the two of them could have time to work on their marriage. (*Id.* ¶ 8 — AP4791.) Sometime around the end of June, Isidro drove their sons to Texas. (I. Gomez Dep., Vol. III, at 600 — AP3032; I. Gomez Aff. ¶ 9 — AP4791.) Rickie Jean was supposed to stay in the marital home while Isidro was in

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2. As two of the individuals in this case, Isidro and Rickie Jean Gomez, share the same last name, the court will refer to them by their first names for clarity.

3. With their motion, defendants fled an extensive appendix which contains copies of all notes, memoranda, reports, photographs, records, deposition transcripts and other exhibits. These materials have been sequentially paginated, and references to the pages numbers of these documents are designated as "AP __." For clarity, the court will use the same system for its citation to these materials.

Texas. (I. Gomez Aff. ¶ 8 — AP 4791.) Isidro called Rickie Jean from Texas and invited her to meet him in Atlanta at the home of Rickie Jean's sister and brother-in-law, Linda and Ron Hailey, so that they could discuss reconciliation. (*Id.* ¶ 10 — AP4791.) Rickie Jean agreed and they met in Atlanta on Friday, 11 July 1980. (*Id.* ¶ 10 — AP4791.) Isidro drove his car from Texas to Atlanta. (*Id.* ¶ 12 — AP4792.) Rickie Jean, who worked for Piedmont Airlines and could fly free, flew to Atlanta. (*Id.* ¶¶ 11, 13 — AP4792.)

Isidro and Rickie Jean spent the weekend in Atlanta with the Haileys. (*Id.* ¶ 14-15 — AP4792.) On Sunday, 13 July 1980, Isidro and Rickie Jean left Atlanta driving Isidro's 1979 Chevrolet Chevette to return to home to Fayetteville. (*Id.* ¶ 16 — AP4792.) However, approximately seven or eight miles into the trip, the crank shaft pulley sheared off and the car broke down. (*Id.*) Isidro called Rickie Jean's sister to come pick them up. (*Id.* ¶ 17 — AP4792.) He also called his friend, James Horton, who lived in the area, to see if Mr. Horton had a vehicle that could tow Isidro's car to a place where he could make the necessary repairs. (I. Gomez Dep., Vol. I, at 111-12 — AP2489-2490; I. Gomez Aff. ¶ 18 — AP4793.) Mr. Horton towed Isidro's car to the Horton's home in Ellenwood, Georgia, a suburb of Atlanta, where Isidro removed the broken crankshaft pulley. (I. Gomez Dep., Vol. 1, at 113 — AP2491; I. Gomez Aff. ¶¶ 18-19 — AP4792-4793.)

The parts that Isidro needed to fix the car could not be purchased until a Chevrolet dealership opened on Monday morning, so the Hortons invited Isidro and Rickie Jean to spend the night. (I. Gomez Aff. ¶¶ 19, 21 — AP4793.)

However, Rickie Jean was scheduled to work at 6:30 a.m. on Monday morning at Piedmont. (*Id.* ¶ 21 — AP4793; Huffman Interview Notes — AP1051.) At that time, Rickie Jean was a part-time employee with a desire to become a full-time employee and had never missed a day of work or even been late for a shift. (I. Gomez Dep., Vol. 1, at 117 — AP2495; Rogers Interview Notes — AP1057.) Consequently, Rickie Jean decided to fly back to Fayetteville that evening. (I. Gomez Aff. ¶ 21 — AP4793.) Isidro and Rickie Jean had dinner with the Hortons that Sunday evening, and, afterward, they dropped Rickie Jean off at the Atlanta airport. (*Id.* ¶ 22 — AP4794.)

C. Rickie Jean's Murder

Isidro spent Sunday night with the Hortons. (I. Gomez Aff. ¶ 24 — AP4794.) In the morning, Mrs. Horton took Isidro to the Chevrolet dealership where he purchased the parts for his car. (*Id.*) After making the repairs to his car, Isidro left for Fayetteville between 10:00 and 10:30 a.m., Monday, 14 July 1980. (*Id.*) Mrs. Horton and Sandra Gail Mills, the fiancée of the Horton's son, were at the house when Isidro departed. (*Id.*)

According to Isidro, he drove the 376 miles from Ellenwood Georgia, to Fayetteville, North Carolina, stopping once to get gas, have a snack, and stretch his legs. Isidro arrived at home at approximately 6:00 p.m. that evening. (I. Gomez Aff. ¶¶ 25-27 — AP4794; Ex. B — AP4810.) Isidro pulled into the left side of the driveway, as usual, and entered the house. (I. Gomez Aff. ¶ 29 — AP4795.) Rickie Jean was not at home. (*Id.*) Isidro proceeded to take a shower and drink a

beer. (*Id.*) At some point, he noticed a few small blood stains in the house. (*Id.*) One of the stains on the carpet at the foot of the bed appeared as though someone had attempted to clean it. (*Id.*)

Soon after he arrived home, Isidro received a phone call from David Rogers, Rickie Jean's supervisor at Piedmont. (I. Gomez Aff. ¶ 32 — AP4796.) Rogers asked Isidro if he knew where Rickie Jean was because she had not reported for work that morning. (*Id.*) During this conversation, Rogers confirmed that Rickie Jean had arrived in Fayetteville on a Piedmont flight on Sunday evening. (*Id.*; 1980 Rogers Interview Notes — AP1055.) After speaking with Rogers, Isidro called Rickie Jean's nieces and a friend of hers in an attempt to locate her. (I. Gomez Aff. ¶ 33 — AP4796.) Isidro then called a friend to see if he would ride out to the airport with Isidro to look for Rickie Jean's car. (*Id.* ¶ 34 — AP4796.) Isidro wrote a note to Rickie Jean in case she came home while he was out and went outside to wait for his friend. (I. Gomez Aff. ¶ 34 — AP4796.) While outside, Isidro then noticed a large brownish stain on the driveway on the passenger side of his car. (*Id.*) At this point, Isidro summoned his neighbor, Earl Usrey, to show him the stains. (*Id.* at ¶ 35 — AP4797.) Isidro asked Usrey what he should do and Usrey suggested that he call the police, which Isidro then did. (I. Gomez Aff. ¶ 36 — AP4797.)

The first deputy arrived at approximately 7:00 p.m. and, thereafter, a crime scene investigation was conducted. (I. Gomez Aff. ¶¶ 37-39 — AP4797-4798.) Isidro authorized the investigators to search the residence and remove any physical evidence they discovered. (*Id.*) During the crime

scene search, the investigators discovered blood on the door jamb leading into the master bedroom, on the floor of the master bedroom, on the inside of a lamp shade in the master bedroom, and on a sink in the master bath. (City-County Bureau of Identifcation Investigative Report — AP872; City-County Bureau of Identification Call Record — AP877.) Investigators also discovered a large blood stain on the underside of the mattress in the master bedroom and some shoe tracks in a stain in the driveway, which Isidro reported that he had not seen. (*Id.*)

After the house was searched, Isidro voluntarily went to the law enforcement center to be interviewed. (I. Gomez Aff. ¶ 41 — AP4798.) He had no cuts, bruises, or abrasions on his hands, face, arms, legs, or any other exposed part of his body. (*Id.*)

At approximately 10:20 a.m. the next morning, 15 July 1980, Rickie Jean's dead body was discovered in the back floorboard of her car, which was parked in a wooded area about a mile from the Gomez house. (I. Gomez Aff. ¶ 42 — AP4798; N.C. State Bureaus of Investigation Initial Report — AP739; City-County Bureau of Identification Call Record — AP874, AP878.) Rickie Jean was still in her nightgown. (*Id.*) Also in the car was the bed linen from the master bedroom. (City-County Bureau of Identification Call Record — AP874.) A second crime scene investigation was conducted and the technicians were able to lift latent fingerprints from the car. (City-County Bureau of Identification Investigative Report — AP874; City-County Bureau of Identification Call Record — AP878.)

Appendix B

An autopsy revealed that Rickie Jean had been beaten badly about the face and body, choked and stabbed to death. (Statement of Investigating Officer in Detail — AP855, ¶ 38; Report of Autopsy — AP893-898.) The fatal blow was a stab wound to the chest that punctured her heart and lungs. (Report of Autopsy — AP898.) The autopsy also revealed defensive wounds to the hands and arms. (Statement of Investigating Offcer in Detail — AP855, ¶ 39.) The estimated time of death was between 6 hours and 36 hours prior to the time of the discovery of the body, or between 10:20 p.m. Sunday, 13 July, 1980, and 4:20 a.m. on Tuesday, 15 July 1980. (Report of Autopsy — AP898.)

On 18 July 1980, three days after the discovery of Rickie Jean's body, Isidro voluntarily submitted to a polygraph examination. (I. Gomez Aff. ¶ 44 and Exhibit C attached thereto — AP4799, AP4811-4818.) The agent who administered the test, informed Isidro that he had failed the test. (*Id.*)

D. The Investigation of Isidro Gomez

In 1980-1981, Isidro was investigated as a suspect in the murder. However, following the investigation, Isidro was not arrested. Sometime in 1981, Isidro remarried and shortly thereafter moved to Michigan.

In 1994, Earl Ray Butler was elected Sheriff of Cumberland County. (Butler Dep., at 15, AP1665.) After taking office, Sheriff Butler appointed defendant Sergeant Atkins to review the files of old unsolved murder cases, which included the Rickie Jean Gomez case. (Atkins Dep., Ex. 43 — AP4873-4874.) Atkins began reviewing the file in late October or

early November 1995. (Atkins Dep., at 68, AP1491.) During this investigation, new blood samples were collected from Isidro such that DNA analysis, which was not conducted in 1980, could be performed. (I. Gomez Aff. ¶ 52 — AP4802.)

Isidro's blood sample, along with some reference samples of Rickie Jean's DNA and fingernail clippings, were sent to a private laboratory on 16 April 1996. (Atkins Dep., at 136-38, AP1559-1561; Clement Dep., Ex. I — AP1764; Ex. I — AP1871-1872.) A serology test of the nail clippings had revealed the presence of Type "A" blood under the nails in 1980. (State Bureau of Investigation Laboratory Report — AP879-880.) On 29 April 1996, the lab reported that the DNA profile obtained from the clippings was "consistent with the DNA profile" of Rickie Jean and "different than the DNA profile" of Isidro. (Clement Dep., Ex. I, AP1871-1872.)

E. The Arrest

On 14 May 1996, Atkins met with his supervisors[4] and Deborah Koenig, the attorney for the Sheriff's Department. (Atkins Dep., at 120 — AP 1542; Koenig Aff. ¶ 6 — AP4786.) After reviewing the evidence presented by Atkins in his "Statement of Investigating Officer in Detail," everyone in the meeting agreed that there was sufficient evidence to seek a warrant for Isidro's arrest. (Atkins Dep., at 130-32, 134-36 — AP1553-1555, AP1557-1559.) On that same day, Atkins applied for an arrest warrant. (Atkins Dep., at 119 — AP1542.) In support of the warrant application, Atkins presented to the magistrate an Affidavit and a working copy of his "Statement

4. Defendant Sheriff Butler did not participate in this meeting. (Atkins Dep., at 119-20 — AP1542-1543.)

of Investigating Officer in Detail." (Atkins Dep., at 153-54 — AP1576-1577.) The magistrate issued the warrant and Isidro was immediately arrested on 14 May 1996 in Virginia, where he was currently residing. (Warrant for Arrest — AP1362; I. Gomez Aff. ¶ 53 — AP4802.) Isidro was extradited to North Carolina on 24 May 1996. (*Id.*)

On 26 and 27 September 1996, a probable cause hearing was conducted, and the court determined that there was probable cause to support Isidro's arrest. (Transcript of Probable Cause Hearing — AP1172, AP1355.) Thereafter, a Cumberland County grand jury returned a true bill of indictment against Isidro. (I. Gomez Aff. ¶ 55 — AP4803.) On 12 January 1998, the eve of trial, a decision was made by the District Attorney to dismiss all charges against Isidro due to lack of evidence. (Dismissal and Notice of Reinstatement and Memorandum attached thereto — AP1374-1375.) Additional facts will be introduced as needed for discussion.

III. MOTION TO STRIKE

The court first turns to plaintiffs' motion to strike the affidavit of Cuyler Windham and defendants' motion for leave to file the same. This affidavit was submitted by defendants in conjunction with their reply briefs in support of their motions for summary judgment. Plaintiffs assert that the court should strike this affidavit as untimely because defendants were required to file any affidavits in support of their motion with the original motion itself. *See* Fed. R. Civ. P. 6(d). Defendants respond that the court should exercise its discretion to accept the late affidavit as the affidavit responds to issues raised by the plaintiffs for the first time in

plaintiffs' response brief. *See Orsi v. Kirkwood*, 999 F.2d 86, 91 (4th Cir. 1993) (district court has discretion to consider a late affidavit if cause or excusable neglect has been shown by the party submitting the late affidavit). The court finds that defendants have shown cause as to why the court should accept this affidavit. Therefore, plaintiffs' motion to strike will be denied and defendants' motion for leave to file the affidavit will be allowed.

IV. MOTION FOR SUMMARY JUDGMENT

A. Summary Judgment Standard

Summary judgment is appropriate in cases where there is no genuine dispute as to a material fact, and in which it appears that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 214 (4th Cir. 1993). Summary judgment should be granted in those cases "in which it is perfectly clear that no genuine issue of material fact remains unresolved and inquiry into the facts is unnecessary to clarify the application of the law." *Id.* In making this determination, the court draws all permissible inferences from the underlying facts in the light most favorable to the party opposing the motion. "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991).

Appendix B

B.- Collateral Estoppel

In their motions for summary judgment, defendants initially assert that plaintiffs are collaterally estopped from raising the probable cause issue, the issue central to plaintiffs' claims, because probable cause was conclusively established at the probable cause hearing conducted in September 1996. Defendants also contend that probable cause was further established when a grand jury returned a true bill of indictment against Isidro. Plaintiffs respond that under North Carolina law of collateral estoppel and the statutory procedures for probable cause hearings, plaintiffs have not had a full and fair opportunity to litigate this issue, especially given that in North Carolina a probable cause determination is an unappealable interlocutory order. Therefore, plaintiffs maintain that they are not estopped from litigating the existence of probable cause in this litigation. The court agrees with plaintiffs and for the reasons stated in plaintiffs' response brief, the court concludes that plaintiffs are not collaterally estopped from litigating the issue of probable cause in this action.

C. Atkins' Immunity from Suit

Before turning to defendants' arguments on the merits of plaintiffs' claims, the court must first address defendant Atkins' argument that he is entitled to federal qualified immunity on the §1983 claims against him and entitled to state law immunity on the state law claims asserted.

Appendix B

1. Federal Qualified Immunity Standard

Qualified immunity protects government officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To determine whether an officer is entitled to qualified immunity, the court " 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all,' " before " 'proceed[ing] to determine whether that right was clearly established at the time of the alleged violation.' " *See Wilson y. Layne*, 526 U.S. 603, 609 (1999) (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)). The nature of the right allegedly violated must be defined "at a *high* level of particularity." *Rogers v. Pendleton*, 249 F.3d 279, 286 (4th Cir. 2001) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 250-51 (4th Cir. 1999)).

2. Federal Qualified Immunity of Defendant Atkins

Defendant Atkins asserts that he is entitled to qualified immunity against plaintiffs' claims because there was probable cause to arrest Isidro for the murder of Rickie Jean. However, for the purpose of a qualified immunity analysis, the Fourth Circuit Court of Appeals has stated that "the absence of probable cause is not determinative. Rather, where a law enforcement officer acts pursuant to a warrant; the critical question is whether the officer could have reasonably thought there was probable cause to seek the warrant." *Wadkins v. Arnold*, 214 F.3d 535, 539 (4th Cir. 2000). "Only

where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost." *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986) (citation omitted). The Supreme Court has further observed:

> [I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable.

Anderson v. Creighton, 483 U.S. 635, 641, (1987) (citing *Malley*, 475 U.S. at 344-45). Therefore, an officer may be entitled to qualified immunity even if the warrant at issue is later determined to have been lacking in probable cause. *Wadkins*, 214 F.3d at 539.

For the purpose of the court's analysis of the reasonableness of an officer's belief that probable cause existed, the Fourth Circuit has noted that "the legal principles relating to the probable cause standard provide a convenient starting point." *Id.* Probable cause exists when the facts and circumstances within an officer's knowledge—or of which he possesses reasonably trustworthy information—are sufficient in themselves to convince a person of reasonable caution that an offense has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (citation omitted). In assessing whether probable cause exists, a court must examine the totality of the circumstances. *Taylor v. Waters*, 81 F.3d 429, 434 (4th Cir. 1996). Determining whether the

information surrounding an arrest suffices to establish probable cause is an individualized and fact-specific inquiry. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). Consequently, the court will examine the totality of the evidence available to Atkins at the time he sought a warrant for the arrest of Isidro Gomez to determine if a reasonable officer could have believed that probable cause existed.

In his motion for summary judgment, defendant Atkins contends that there is "an abundance of evidence" that points to Isidro as Rickie Jean's murderer. (Def. Atkins' Br. in Support of Summ. J. at 16.) In support of his argument, Atkins directs this court time and time again to the Statement of Investigating Officer in Detail (AP851-856) which lists all of the evidence from which Atkins drew his conclusion about probable cause. This document also represents the evidence that he presented to his superiors and Attorney Koenig in their meeting, and to the magistrate who issued the arrest warrant.

However, the question of whether this compilation of evidence, taken as is, supports a reasonable belief that probable cause existed, is irrelevant to the plaintiffs' argument. Plaintiffs' claim is premised upon the allegation that this critical summary of evidence compiled and relied upon by Atkins and others contains material falsities, inaccuracies, misleading statements, and omissions. The entire basis of plaintiffs' action is that when these falsities and omissions are corrected and the evidence viewed more completely and accurately, no reasonable officer could have believed that Isidro committed, or even had an opportunity to commit, the murder of Rickie Jean Gomez.

Appendix B

The court's analysis begins with the information compiled by Atkins for the purpose of seeking a warrant against Isidro. The thrust of plaintiffs' argument is that the totality of the evidence demonstrates that Isidro was not and could not have been in Fayetteville at the most obvious time of Ricki Jean's murder. The evidence cited by Atkins that would connect Isidro to the murder include the following:[5]

> 1) "At the time of the autopsy of the Victim, the Defendant's [Isidro's] body hairs were found on the body of the victim. SBI laboratory tests indicate the recovered body hairs are consistent with the body hairs of the Defendant." (Statement of Investigating Officer in Detail ¶ 1 — AP851.)
>
> "On 15 July, 1980 a crime scene search by ID Bureau Technicians disclosed some body hairs on the bed coverings that were in the Victim's car along with her body. And the testing of the body hairs found on the bedclothes by the SBI Laboratory indicated that the body hairs were consistent with the body hairs of the Defendant." (*Id.* ¶ 36 — AP855.)

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5. Many of the statements made by Atkins are general statements about the crime and the state of the crime scene and, as such, are neutral as it relates to the identity of the murderer. Other statements relate to a possible motive for Isidro to have murdered Rickie Jean. However, for the purpose of the court's analysis, the court has focused on those statements which would suggest that Isidro either had the opportunity to commit the crime or was physically present at the scene when it was committed.

2) "The SBI laboratory tested the blood residue [found at the crime scene] and indicated that the blood type was type 'A'. The blood type of the Defendant is type 'A.' Testing of the blood of the Defendant by the SBI laboratory indicated that the blood found under the fingernails of the Victim [was] consistent with the blood type of the Defendant." (*Id.* ¶ 2.)

3) "On 14 July, 1980 the crime scene search by ID Bureau Technicians disclosed footprints in blood in the driveway of the Gomez home. Comparison of the size of the shoe print in blood indicated a possible size '7'. The Defendant's shoe size by his own statement is '7' to '7½' depending upon what type of shoe." (Id. ¶ 4.)

4) "On 14 July, 1980 the crime scene search by ID Bureau Technicians disclosed a wet washcloth on the edge of the bathtub in the master bath with what appeared to be blood on it. The blood was diluted from having been washed out." (*Id.* ¶ 27 — AP854.)

5) "On 14 July, 1980 while the Defendant has stated several times that he arrived in Fayetteville, N.C. at 1800 hours, there are witnesses who have stated that they spoke personally with Isidore [sic] Gomez by telephone as early as 1500 hours this same day and at least 3 hours prior to him stating that he arrived at 1800 hours." (*Id.* ¶ 32.)

6) An SBI agent and a Sheriff's Detective drove the route Isidro had taken from Georgia to Fayetteville in four and a half to five hours with one stop for gas and food. (*Id.* ¶ 33.)

7) The location of the stab wounds on the victim indicated that the suspect was right-handed, and the Defendant is right-handed. (*Id.* ¶¶ 40, 41.)

8) The Defendant took and failed a polygraph test.[6] (*Id.* ¶ 50 — AP856.)

While the above evidence proffered by Atkins would give rise to at least arguable probable cause that Isidro had committed the murder, when the evidence is adjusted for material misstatements, inaccuracies and omissions, probable cause deteriorates significantly. First, plaintiffs assert that Atkins' statement that "the Defendant's body hairs were found on the body of the victim," (*Id.* at ¶ 1), is, at minimum, misleading because the 1980 SBI report found only that the hairs were "microscopically consistent." (State Bureau of Investigation Laboratory Report — AP885-886.) Furthermore, the plaintiffs assert that any reasonable homicide investigator in 1996 should have known that such a test could only

6. While plaintiffs do not dispute the accuracy of this statement, they do challenge the validity of the polygraph test to which Isidro voluntarily submitted. Plaintiffs assert that it was administered only three days after the discovery of Rickie Jean's body, that Isidro warned the agent conducting the test that he would likely give an emotional response and that the agent administering the test was biased because he was the agent assigned to the case and was attempting to build a case against Isidro. (I. Gomez Aff. ¶ 44 - AP4799.)

indicate whether the hair was human, from what part of the body it originated, the person's race, and in some cases, the age of the individual, depending on the graying of the hair, but could not determine the individual to whom the hair belonged. (Tucker Aff. ¶ 12 — AP4835.)

Next, while they do not dispute the statement that Isidro's blood type, type "A," was found under Rickie Jean's fingernails in 1980, plaintiffs assert that Atkins failed to further disclose that the DNA analysis of the fingernails completed on 29 April 1996, prior to seeking the warrant, did not detect the presence of Isidro's DNA. (29 April 1996 Laboratory Report — AP1872.) Plaintiffs also point out that despite the fact that Isidro's blood type was found at the scene, blood typing, as with microscopic hair analysis, yields only class evidence as opposed to individualized evidence. (Tucker Aff. ¶ 12 — AP4835.)

As for Atkins' statement that the size "7" bloody shoe prints found in the driveway were the same size as Isidro's, an unquestionably critical piece of evidence, Atkins own notes indicate that Isidro told Atkins that his shoe size was "11" to "11½" (I. Gomez Aff. ¶ 50 and Exhibit E attached thereto — AP4801, AP4821-4826.) Obviously, this evidence is a strong indication that someone other than Isidro committed the murder.

As for Atkins statement that a bloody washcloth was found in the bathroom where Isidro had reportedly taken a shower after arriving home, a 1980 laboratory test detected no blood on the washcloth. (State Bureau of Investigation Laboratory Report — AP880.)

Next, Atkins reports that *witnesses* stated that they personally spoke to Isidro as early as 3:00 p.m. despite Isidro's statement that he arrived back in Fayetteville around 6:00 p.m. (Statement of Investigating Officer in Detail ¶ 32 — AP854.) In fact, there was only one witness that stated that he had spoken to Isidro on the phone that afternoon. This witness was David Rogers, Rickie Jean's supervisor at Piedmont. In his 1980 interview, Rogers told investigators that he spoke to Isidro at 6:20 p.m., which is consistent with Isidro's recollection. (1980 Rogers Interview Notes — AP1058; I. Gomez Aff. ¶ 32 — AP4796.) In 1996, sixteen years later, Rogers told Atkins that he "believed" that it was around 3:00 p.m. when he spoke to Isidro. (1996 Rogers Interview Notes - AP 1053.) However, Rogers also stated that "his recall of the events in July, 1980 and what he said in his interviews then with the original Detectives might be differant [sic], but what he had told the Detectives in July, 1980 would be the facts and the truth as he knew it then and that [t]he notes written by the Detectives in 1980 would be the facts as he told it to them." (*Id.* at AP1054.)

Plaintiffs next contend that the four and a half to five hour estimate of the drive time from Atlanta to Fayetteville reported by the investigating officers was facially incredible. Plaintiffs assert that a simple calculation reveals that to drive the 376 miles total distance, with a twenty minute stop for gas and food,[7] would require an average speed of approximately 85 to 90 miles per hour for the entire duration of the trip. Nevertheless, Atkins states that the officers did not exceed the speed limit. The speed limit on the interstates

7. This is the court's own estimate for the time it would have taken the two officers to stop.

Isidro used in 1980 was 55 miles per hour. Isidro reported an approximate 7 and one-half hour trip time. Based on this trip time and also allowing for a twenty minute stop, Isidro's average speed would have been about 53 miles per hour.

Plaintiffs contend not only that the above information was false and misleading, they additionally assert that material exculpatory information was not disclosed. First, Atkins failed to disclose that the prints lifted from Rickie Jean's car did not match Isidro's. (State Bureau of Investigation Laboratory Report — AP881-882.) Atkins also did not disclose that: 1) Riekie Jean failed to show up for work at 6:30 a.m. on Monday 14 July 1980, though this was the sole reason for her return to Fayetteville on Sunday evening, (I. Gomez Aff. ¶ 21 — AP4793.); 2) she was found still wearing her nightgown, (City-County Bureau of Identification Call Record — AP874.); and 3) she never called in to work to explain her failure to show up for work despite the fact that, prior to that time, she had never even been late for work. (1980 Rogers Interview Notes — AP 1055; Fermanides Interview Notes - AP 1062.) All of this omitted evidence supports a strong inference that Rickie Jean was murdered before Isidro had even departed Atlanta on Monday morning.

In light of the above, the court concludes that when Atkins' statement of the evidence is corrected for misleading, false and omitted evidence, all that remains is a practically unrefuted alibi, no physical connection of Isidro to the crime with the exception of broad class evidence, circumstances that strongly suggest that Rickie Jean was murdered long before Isidro left Atlanta, and evidence that undeniably suggests that someone *other* than Isidro was the murderer

(i.e., size "7" footprints). In sum, having thoroughly reviewed the totality of evidence available to Atkins at the time he sought the arrest warrant, the court concludes that the evidence does not support a finding of probable cause. The court further concludes that a reasonable officer could not have believed that there was probable cause to seek an arrest warrant under the circumstances. *See Wadkins*, 214 F.3d at 539.[8]

Finally, having found that plaintiffs have alleged the violation of a constitutional right, the court must next address whether that right was clearly established at the time of the alleged violation. *See Wilson*, 526 U.S. at 609. However, defendant Atkins has conceded, and the court agrees, that the right to be free from arrest without probable cause was clearly established at the time of Isidro's arrest. *See Wadkins*, 214 F.3d at 538 (adopting the reasoning of *Wadkins v. Arnold*, No. 97-0151-A, mem. op. at 12-13 (W.D. Va. Feb. 19, 1999)). Therefore, as plaintiffs have sufficiently alleged that Atkins has violated a clearly established constitutional right, the court concludes that Atkins is not entitled to federal qualified immunity. Consequently, defendant Atkins' motion for summary judgment on the ground of federal qualified immunity will be denied.

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8. In support of his argument that he had a reasonable belief that probable cause existed, Atkins attempts to rely upon the determination that probable cause exists by both a neutral and detached magistrate as well as by the Sheriff's Department attorney and his supervisors. However, as the court concludes that the information presented by Atkins was false, misleading and incomplete, he is not entitled to rely on these independent evaluations.

Appendix B

3. State Immunity of *Defendant Atkins*

Defendant Atkins also contends that he is entitled to immunity on the state law claims asserted against him. In North Carolina; a public officer, sued in his individual capacity, is immune from liability for his negligence, so long as his conduct cannot fairly be characterized as "corrupt or malicious." *Murray v. Justice*, 96 N.C. App. 169, 176 (1989). Plaintiffs assert that North Carolina Courts have long held that malice may be inferred from a lack of probable cause. *See id.* at 173 ("Malice, as required in malicious prosecution actions, may be inferred from a lack of probable cause when instituting the underlying action."); *see also Allison v. Food Lion, Inc.*, 84 N.C. App. 251, 254 (1987) (citing *Taylor v. Hodge*, 229 N.C. 558, 560 (1948)). The court has concluded above that plaintiffs have sufficiently shown a lack of probable cause for Isidro's arrest. As a lack of probable cause gives rise to a inference of malice, the court concludes that Atkins is not entitled to public officer immunity on the state law claims. Consequently, defendant Atkins' motion for summary judgment on this ground will be denied.

Outside of his immunity arguments, Atkins asserts that he is entitled to summary judgment because there was, as a matter of law, probable cause for Isidro's arrest. For the reasons state *supra*, summary judgment on this ground will also be denied.

D. § 1983 Claim Against Defendant Butler in His Official Capacity

The court next addresses defendant Butler's motion to dismiss the § 1983 claim brought against him in his official capacity. As pointed out by defendant, a suit against an official in his official capacity is equivalent to suing the entity. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). Thus, the claims brought by plaintiffs against Butler in his official capacity are claims against the Cumberland County Sheriff's Department ("CCSD").[9]

In its motion, CCSD asserts that plaintiffs have failed to establish a claim of entity liability under § 1983 pursuant to the framework set out in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Under *Monell*, local governments are not liable under § 1983 under a theory of respondeat superior. *Id.* at 694. Rather, entity liability may result only where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or where "constitutional deprivations [are] visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Id.* at 690-91. There must be a "direct causal link between

9. For this reason, the court will refer to the defendant as CCSD in its discussion of the motion for summary judgment by defendant Butler in his official capacity.

a municipal policy or custom and the alleged constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). Where a plaintiff claims that the entity caused a violation of his constitutional rights by failing to implement a policy, including a policy of adequate training, the plaintiff must show that such a failure was the direct result of "deliberate indifference" to the rights of the plaintiff. *Id.* at 388.

Defendant CCSD contends that plaintiffs have failed to forecast any evidence that the failure of CCSD to have a policy regarding the investigation of "cold cases" caused a violation of Isidro's constitutional rights. The court agrees. There is no indication that, nor can the court imagine how, any policy on "cold" cases would have prevented Atkins from allegedly arresting Isidro without probable cause. Plaintiffs have failed to demonstrate how the probable cause standard is different for "cold" cases than for more current cases. As defendant Butler has aptly put it, "Probable cause is probable cause, regardless of the age of the case or the evidence." (Def. Butler's Br. in Support of Summ. J. at 11.) Therefore, even assuming that CCSD should have instituted some type of policy or procedure for the reopening and further investigation of "cold cases," plaintiffs have failed to show how such a policy would have prevented the particular violation alleged in this case. Therefore, the court concludes that defendant CCSD is entitled to summary judgment on plaintiffs' § 1983 claim to the extent that it is based on the lack of a "cold" case policy.

Nevertheless, a reading of the amended complaint reveals that plaintiffs' § 1983 claim against CCSD was not based solely on any "cold case" policy but rather with respect to

"official policies, practices, customs and procedures of the Sheriff's Department, including but *not limited to* the investigation of long-unsolved crimes by the 'cold case' squad. . . ."[10] (Am. Compl. ¶ 154(b) (emphasis added)). Defendant CCSD has not made an argument that it is entitled to summary judgment on the § 1983 claim relating to any policy other than a "cold case" policy. Furthermore, even had CCSD made such an argument, upon full review of the materials filed with the response and reply to the motion for summary judgment, the court finds there to be genuine issues of material fact as to this claim and defendant CCSD is not entitled to summary judgment as a matter of law.

E. State Law Claims Against Sheriff's Department

As for the remaining state law claims brought by plaintiffs against CCSD, defendant Butler has made brief arguments as to why he is entitled to summary judgment on the civil conspiracy and abuse of process claims in his individual capacity, which, as noted previously, have been dismissed. However, he has made no argument as to why CCSD is entitled to summary judgment based on Atkins' actions under a theory of respondeat superior. Therefore, the state law claims against the CCSD remain for adjudication.

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10. The court disagrees with defendant's assertion that plaintiffs have not alleged a § 1983 claim for inadequate training because the word "training" is not used in the complaint. Inadequate training claims have been allowed by the U.S. Supreme Court on the basis that "the failure to provide proper training may fairly be said to represent a *policy* for which the city is responsible . . . ." *Canton*, 489 U.S. at 390 (emphasis added). Thus, the court concludes that the term "policy" in the plaintiffs' complaint is sufficient to raise a claim for deficient "training."

Appendix B

V. CONCLUSION

For the foregoing reasons, plaintiffs' motion to strike the affidavit of Cuyler L. Windham is DENIED and defendants' motion for leave to file the affidavit is ALLOWED. Defendant Atkins' motion for summary judgment is also DENIED. The motion for summary judgment filed by defendant Sheriff Butler in his official capacity is ALLOWED IN PART and DENIED IN PART; specifically, summary judgment is ALLOWED only with respect to the § 1983 claim as it relates to a "cold case" policy.

This 27 August 2001.

s/ W. Earl Britt
W. EARL BRITT
Senior United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC DATED AND FILED AUGUST 5, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED August 5, 2002

No. 01-2112
CA-99-611-5-BR

ISIDRO GOMEZ; LINDA L. GOMEZ, Wife

Plaintiffs - Appellees

v.

W.J. ATKINS, in his official and individual capacity,

Defendant - Appellant

and

EARL MOOSE BUTLER, Sheriff of Cumberland County, in his official and individual capacity; H.R. COLLINS, in his official and individual capacity; JERRY D. WEBSTER, in his individual capacity; WESTERN SURETY COMPANY; DEBRA KOENIG,

Defendants

On Petition for Rehearing and Rehearing En Banc

Appendix C

The appellees petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK